City of Lafayette Staff Report

For: City Council

By: Christine Sinnette, Senior Planner

Date Written: January 16, 2009

Meeting Date: January 26, 2009

Subject: Appeal by Richard Holt of the Planning Commission denial of:

HDP47-07 RICHARD W. HOLT (APPLICANT), LAMORINDA PROPERTIES (OWNER), R-10 ZONING: Request for a hillside development permit pursuant to section 6-2065(a)(8) of the Lafayette Municipal Code (LMC) for site and massing determination for a new, two-story single-family residence ~~3,507~~ ~~3,323~~ ~~2,898~~ 2,639 gross square feet in size on a vacant 26,340 square foot parcel within the Hillside Overlay District, located at the intersection of Sierra Vista Way and Sessions Road (Tract 5332 Lot 66); APN 232-052-019.

V17-08 RICHARD W. HOLT (APPLICANT), LAMORINDA PROPERTIES (OWNER), R-10 ZONING: Request for a variance pursuant to section 6-214 of the Lafayette Municipal Code (LMC) to allow ~~a front yard setback of 20-82 feet, a rear yard setback of 15-75 feet, a western side yard setback of 10-61 feet, an eastern side yard setback of 10-15 feet, and~~ a 5-foot setback from the trail easement for a new two-story, single-family residence ~~2,898~~ 2,639 gross square feet in size on a vacant 26,340 square foot parcel within the Hillside Overlay District, located at the intersection of Sierra Vista Way and Sessions Road (Tract 5332 Lot 66); APN 232-052-019.

SUMMARY OF REQUEST

This matter is a City Council de novo hearing on an appeal of the Planning Commission's denial of HDP47-07 and V17-08 continued from the meeting of December 8, 2009. The applicant is requesting approval of a phase 1 Hillside Development Siting and Massing determination pursuant to section 6-2065(a)(8)(A) of the Lafayette Municipal Code (LMC) to allow development on a vacant lot within the Hillside Overlay District. For development of vacant lots in the Hillside Overlay District, a two-step application process is required. Phase 1 is an application for a siting and massing determination by the Planning Commission on the location and size of structures. The phase 2 application is for the review of the design and impacts of the project.

BACKGROUND

The Planning Commission held five public hearings on the applications. At various times they gave direction to the applicant to reduce the size of the building, set the building farther up the hill, change

driveway locations, and consider alternative parking schemes. At their meeting of September 4, 2008, the Planning Commission directed staff to prepare a resolution denying HDP47-07 and V17-08 because the development was not responsive to the Commission's request to set the house above the 470 contour line in order to provide screening and privacy to the adjoining neighbors and the neighborhood, did not preserve physical features including drainage swales, the site design location and massing of structures did not to the extent feasible, minimize loss of privacy to surrounding residents and had a significant visual impact when viewed from lower elevations including Sessions Road and Sierra Vista Way. Additionally, the development would create a nuisance, hazard, or enforcement problem within the neighborhood and city and would require the city to provide an unusual or disproportionate level of public services because of its location on Sessions Road and the existing design of Sessions Road. They stated that there were no special circumstances concerning the subject property, including size, shape, topography, location or surroundings, that the strict application of the zoning ordinance would deprive the property of privileges enjoyed by other properties in the vicinity and in the same land use district. The variance would constitute a grant of special privilege not generally available to other property in the vicinity and in the same land use district.

On September 18, 2008, the Planning Commission denied HDP47-07 and V17-08. The denial was appealed to the City Council on September 29, 2008. To date, the City Council has held two public hearings on the appeal.

PROJECT DESCRIPTION *(as currently proposed)*

Available Building Area	3,962.5 s.f. on east side of Sessions Road
Gross Floor Area:	Current plans show a gross floor area of 2,639 s.f. consisting of a 441 s.f. garage and 628 s.f. lower floor and 1,570 s.f. upper floor
Height:	31' as measured from the average of the lowest and highest grade at the lowest foundation wall on the south elevation to the middle of the roof

See Attachment 1 – Project Location, Attachment 2 – Context Map, and Attachment 3 – Site Topography, Preliminary Grading and Site Plan, Floor Plans, Building Elevations, and Site Section.

CONFORMANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Staff has determined that this project is exempt from the California Environmental Quality Act (CEQA). It is only a determination on a potential building site and is covered under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Once a determination is made on the siting and massing, any future plans to develop the property as proposed in a phase 2 application will be reviewed for potential environmental impacts on traffic, biotic resources, hydrology, etc.

CONSISTENCY WITH THE GENERAL PLAN

The General Plan land use designation for the property is Medium Density Single Family Residential and allows up to six dwelling units per acre. The proposed single-family dwelling on this .6-acre infill lot served by public services and utilities is consistent with this designation.

CONFORMANCE WITH ZONING REGULATIONS

The property is zoned R-10, Single-Family Residential District – 10 and has been zoned such since at least 1974. The property is located in the Hillside Overlay District; however, it is not located within or near a ridgeline setback. At their meeting of July 3, 2008, the Planning Commission determined that this parcel should be considered a "corner lot" for purposes of setback from a secondary frontage. Development standards for the R-10 District include the following:

Front Setback:	On corner lots the principal frontage of the lot shall have a setback of at least 20 feet and the other setback shall be at least 15 feet.
Side Yard:	Aggregate side yard of at least 20 feet; no side yard less than 10 feet wide.
Rear Yard:	At least 15 feet
Parking:	2 spaces covered or uncovered located outside the side yard or front yard setbacks

As designed, the front setback from Sierra Vista Way is 86 feet, the rear setback is 72 feet, the eastern side yard setback is 15 feet and the setback from the trail easement is 5 feet. Setbacks apply to structures over 6 feet high. A 441 s.f. garage provides parking for two vehicles.

In addition to applying building setbacks from property line, the City also applies yard setbacks to pedestrian access easements. As a corner lot, the setback from the secondary frontage (Sessions Road) and trail easement must be 15 feet. The applicant is requesting a variance to reduce the required setback to 5 feet. It is staff's opinion that there are special circumstances with this property that warrant approval of this variance request as identified in the Findings section below.

STAFF ANALYSIS AND COMMENTS

At the last meeting, the City Council directed the applicant to address their comments and revise the project. See Attachment 4 – City Council Minutes and Attachment – 5 Previous Building Design, Elevations and Cross-Section

1. *Reduce the mass and overall height of the building.*

   Although the overall height of the building has not been reduced, the massing at the front of the house has been. In the previous plan, the living room and office cantilevered out over the garage by four feet. This floor has now been set back eight feet from the face of the garage.

2. *Reduce the building gross square footage to be more consistent with that of the Sierra Vista Way neighborhood which averages 2,400 square feet.*

   The gross square footage of the building has been reduced from 2,898 to 2,639, a reduction of 259 square feet. Overall, the square footage has been reduced by 868 square feet from the original design.

3. *Move the building farther up the slope to the north.*

The building has been relocated from the 463 contour interval to the 464 contour interval resulting in an additional setback of four feet up the slope to the north. The offset between the rear of the Swarts house and the corner of the proposed garage is 25 feet.

4. *Minimize impacts to the trees east of the building.*

The applicant has not responded directly to this request. However, the arborist's report prepared by Baefsky and Associates, dated July 6, 2007 and April 1, 2008 provide for the identification, measurement, and evaluation of twenty-eight trees located on the east side of Sessions Road. The reports were reviewed by the City's landscape consultant, Pennell Phillips of Inside Out Design, Inc. Mr. Phillips stated that the reports were thorough and he agreed with the majority of the recommendations. Mr. Phillips recommends that replacement trees be native to an oak woodland environment and be specified as either coast live oak or valley oak. See Attachment 6 for the Baefsky reports.

Based on the revised plan, eight trees would have to be removed because they directly conflict with the house location. One less tree (Canary Island pine) will be impacted by the current plan. One other tree is close to a proposed retaining wall and may be impacted. The following table lists the trees to be removed.

Tree No.	Species	Size	Condition	Comment	Replacement Trees
7	California pepper	21"	Very poor/poor	May be impacted by retaining wall	8
9	Coast redwood	22", 13"	Poor-Fair	Building conflict	12
10	Coast redwood	21"	Fair	Building conflict	8
12	Coast redwood	18"	Fair	Building conflict	6
13	Coast redwood	23", 12"	Fair	Building conflict	12
14	Coast redwood	22"	Fair-Good	Building conflict	8
15	Coast redwood	19"	Fair	Building conflict	8
18	Coast redwood	19", 11"	Poor-Fair	Building conflict	10
19	Coast redwood	18"	Poor	Building conflict	8

There are three trees (#17, #21, #22) within 3 to 5 feet of the eastern wall of the house which may be impacted by construction or the proposed drainage swale. Tree #17 is a multi-trunk Coast redwood in poor condition. Trees #21 and #22 are Canary Island pines with 15.6 and 18.2 inch diameter trunks, respectively, and in poor condition.

In addition to the identification and evaluation of the trees, the report also contains recommendations for preservation or removal. Survivability is the basis for these recommendations given the proposed site work and its likely impact on the trees. A tree preservation program for during and after construction is included in the July 6, 2007 report. The program includes excavation and inspection of the root crown region, installation of protective fencing, air spade trenching and selective professional root pruning, pruning for clearance, and an irrigation schedule. To ensure that impact to trees, including removal, are mitigated to the maximum extent practicable, a condition of approval will require that the applicant submit a revised arborist's and tree preservation plan for the phase 2 design review application.

Lot 66 is a legal lot and the property owner has the right to use to the property for an economically viable use. A single-family residence is an allowed use in the R-10 zoning district. As proposed, this is the best location to site a home on this property. The western slope is too steep and would require significant grading. The City Engineer, City's traffic consultant, and Fire District reviewed this phase 1 application. None of their comments precluded or restricted safe access to the building site and its development for a single-family home.

It is staff's opinion that the issue of privacy between the subject property and the Swarts house has been addressed by the applicant to the maximum extent feasible. The rear of the Swarts house, which has no windows, is 25 feet from the corner of the proposed garage. There is a retaining wall approximately five feet from the rear of the house and then the terrain rises steeply upward at a 2:1 slope. The eastern elevation of the proposed house faces this slope and not the Swarts home. Additionally, windows on the eastern elevation are placed five to six feet above the floor line providing light but not direct views down and south to the Swarts home. The proposed house is set back 15 feet from the eastern property line where only 10 feet is required by the Zoning Ordinance.

The proposed size and scale of this development is similar to other properties in the Sierra Vista neighborhood and the site is flanked by two-story homes. Development grading has been minimized by terracing the building and using foundation walls to bunker the building into the slope. Due to its location within a developed residential area with varied topography and mature vegetation, there is no visibility of the project site from distant, off-site locations. As designed, development will not interfere with the existing trail located on Sessions Road.

Visual and privacy impacts not already mitigated by the current plan can be further addressed by careful attention to architectural details, consideration of building materials and colors, and vegetative screening during the phase 2 application process.

PUBLIC NOTICE AND COMMENT

This matter was continued from the City Council meeting of December 8, 2008 and no new notice has been provided. Public correspondence submitted for this meeting is included in Attachment 7.

FINDINGS

In order to approve a variance request, the following findings must be made. It is staff's opinion that these findings can be made.

6-214 Specific findings necessary for variance.

A variance may only be granted when:

1. Because of special circumstances concerning the subject property, including size, shape, topography, location or surroundings, the strict application of the zoning regulations deprives the property of privileges enjoyed by other properties in the vicinity and in the same land use district.

   The special circumstances which concern this property are that it is bisected by Sessions Road and a 50-foot wide City of Lafayette trail easement serving the public good. Steep topography further constrains the area for development. Application of a 15-foot setback from the trail

easement would leave a maximum building area width of only 25 feet. Corner lots within the R-10 district can accommodate houses 50 feet or more in width. Additionally, the variance will not have a direct impact on the trail because the trail through the subject property is on the paved portion of Sessions Road. Development is set back more than 20 feet from the paved road/trail.

2. The variance will not constitute a grant of special privilege which is not generally available to other property in the vicinity and in the same land use district.

   Construction of a single-family home is a privilege shared by others and allowed in the R-10 zoning district. Other property owners faced with application of yard setbacks from not only property lines but from access easements would be granted the same concessions as long as the proposed project did not unduly interfere or impact the access easement.

3. The variance substantially complies with the intent and purpose of the land use district in which the property is classified.

   The applicant is requesting a variance to construct a single-family home which is a permitted use in the R-10 zoning district. Other that the request to reduce the side yard on this corner lot, the development complies with all other development standards of the R-10 zoning district including building height, front and rear yard setbacks, and provision of two on-site, covered parking spaces.

In order to approve this phase 1 hillside development application for the siting of new development on a vacant lot in the Hillside Overlay District, the following findings must be made. It is staff's opinion that these findings can be made.

6-2071 Findings required for approval of a hillside development permit on an existing lot of record.

The hearing authority may approve an application for a hillside development permit on an existing lot of record in the hillside overlay district only after making the following findings:

a. The development is consistent with the applicable goals and policies of the general plan and is in conformance with applicable zoning regulations.

   The development is consistent with the applicable goals and policies of the general plan and is in conformance with applicable zoning regulations because as designed the project conforms to the density allowed by the Medium Density Single Family Residential General Plan designation which allows up to six dwelling units per acre. The project is infill development and will be served by public services and utilities. With approval of a variance to the setback from the trail easement, the project conforms to the development standards of the R-10 zoning district including building height, front and rear yard setbacks, and provision of two on-site, covered parking spaces.

b. The development will preserve open space and physical features, including rock outcroppings and other prominent geological features, streams, streambeds, ponds, drainage swales, native vegetation, native riparian vegetation, animal habitats and other natural features.

No prominent geological features, streams, streambeds, or ponds will be impacted by the project. The existing swale will be replaced with a system of open and closed channels and will be designed to mitigate any potential drainage impacts from the project development. Proposed development affects only a limited area of the 26,340 square foot parcel. The open, western slope will remain undeveloped except for the possible planting of native oak trees to mitigate the removal of the non-indigenous trees and vegetation in the development area. No vegetation indigenous to Lafayette will be removed.

c. Structures in the hillside overlay district will, to the extent feasible, be located away from prominent locations such as ridgelines, hilltops, knolls and open slopes.

Although located in the Hillside Overlay District, the proposed single-family residence is not located near any prominent ridgeline, hilltop, knoll, or open slope.

d. The development, including site design and the location and massing of all structures and improvements will, to the extent feasible:

1. Minimize the loss of privacy to surrounding residents and not unduly impact, restrict or block significant views;
2. Not have a significant visual impact when viewed from lower elevations from public places, using the viewing evaluation map as a guide to establish locations from which views are considered; and
3. Not interfere with a ridgeline trail corridor or compromise the open space or scenic character of the corridor.

The issue of privacy between the subject property and the adjacent property to the east ("Swarts") has been addressed by the applicant to the maximum extent feasible. The rear of the Swarts house, which has no windows, is 25 feet from the corner of the proposed garage. There is a retaining wall approximately five feet from the rear of the Swarts house and then the terrain rises steeply upward at a 2:1 slope. The eastern elevation of the proposed house faces this slope and not the Swarts home. Additionally, windows on the eastern elevation are placed five to six feet above the floor line providing light but not direct views down and south to the Swarts home. The proposed house is set back 15 feet from the eastern property line where only 10 feet is required by the Zoning Ordinance.

The proposed development was evaluated using the list of public places from the City's viewing evaluation map. Listed locations used to evaluate visual impacts included Deer Hill Road, First Street, Highway 24, Sessions Road, Sierra Vista Way, and the BART station and parking lot. Due to its location within a developed residential area with varied topography and mature vegetation, there is no visibility of the project site from off-site locations such as Deer Hill Road, First Street, Highway 24 or the BART station. The site is highly visible from Sessions Road and Sierra Vista Way, as are most of the other developed properties on these streets. However, the purpose of the Viewing Evaluation Map is to establish locations from which views of open and highly visible portions of Lafayette's scenic hillsides and ridgelines can be seen when viewed from below the proposed development. This is not the case with this project.

A 50-foot wide trail easement bisects the project site. This easement contains the Petar Jakovina Trail which follows the paved roadway as it passes through the project site. As

designed, the project will not impact public access to the Trail which is designated for hiking only. The proposed house is at least 20 feet from the paved road/trail.

e. Within 100 feet of a restricted ridgeline area, or when an exception to a ridgeline setback has been granted, the development will result in each structure being substantially concealed by terrain or vegetation when viewed from lower elevations from public places, using the viewing evaluation map as a guide to establish locations from which views are considered.

This finding is not applicable to this project.

f. Development grading will be minimized to limit scarring and cutting of hillsides especially for long roads or driveways, preserve existing geologic features, topographic conditions and existing vegetation, reduce short and long-term erosion, slides and flooding, and abate visual impacts.

Development grading has been minimized by terracing the building and using foundation walls to bunker the building into the slope. Grading for the driveway is limited to that necessary to provide access to the garage and to provide for adequate turnaround so vehicles can enter Sessions Road without backing into the roadway.

g. The development provides adequate emergency vehicle access, including turn-around space, to the building site and surrounding on-site undeveloped or isolated areas.

Access to the site is provided by Sierra Vista Way and Sessions Road. The Contra Costa County Fire Protection District did not identify any problems with emergency access, driveway or roadway grades, or fire apparatus turnaround.

h. Each structure and proposed landscaping complies with the city's residential design guidelines.

The massing and siting of the project is appropriate for this location. The building has been stepped with terrain presenting one- and two-story elements and differentiated rooflines when approached from lower Sessions Road. Foundation retaining walls are used to bunker and set the building into the grade. No landscaping is proposed for this phase 1 application.

i. The new or replacement vegetation for the development is native to the surrounding area in areas abutting open space and natural areas, such as oak woodland, chaparral, grassland and riparian areas, and conforms to the policies of Section 6-2051.

This finding is not applicable to this phase 1 hillside development application although the project is conditioned to provide a landscape plan for phase 2 utilizing native, evergreen trees and shrubs.

j. The development will not create a nuisance, hazard or enforcement problem within the neighborhood or the city, nor require the city to provide an unusual or disproportionate level of public services.

The project site is an existing lot in a planned subdivision served by public and private streets and will be served by public services and utilities. The proposed development has been reviewed by the Contra Costa County Fire Protection District, the City Engineer, and the City

traffic consultant. The Contra Costa County Fire Protection District did not identify any problems with emergency access, driveway or roadway grades, fire apparatus turnaround or any other problems or deficiencies that would create a nuisance or hazard or require the provision of an unusual or disproportionate level of service. The City Engineer reviewed the Preliminary Geotechnical Reconnaissance Report and drainage study and preliminary drainage plan prepared for the project. The City Engineer agrees with the conclusions, recommendations, and preliminary plans and, as conditioned, project development will not create a nuisance or hazard related to geology, soils, drainage, or water quality. The City traffic consultant did not identify any traffic related hazards which could result from this phase 1 application.

RECOMMENDATION

As a de novo hearing, the City Council may act upon the applications by granting approval, conditionally granting approval, or denying, one or both applications. Staff recommends that the City Council adopt Resolution 2009-05 upholding the appeal by Lamorinda Properties of the Planning Commission denial of HDP47-07 and V17-08 and approving HDP47-07 and V17-08 subject to the findings and conditions contained in the Resolution.

ATTACHMENTS

1. Project Location
2. Context Map
3. Site Topography, Preliminary Grading and Site Plan, Floor Plans, Building Elevations, and Site Section *(6 sheets)*
4. City Council Minutes, December 8, 2008
5. Previous Building Design, Elevations and Cross-Section
6. Baefsky & Associates Arborist Report, dated July 6, 2007 and April 3, 2008
7. Public Correspondence

BEFORE THE CITY COUNCIL OF THE CITY OF LAFAYETTE

In the Matter of:

Consideration of the appeal by Lamorinda Properties of the Planning Commission's denial of HDP47-07 and V17-08 for siting and massing determination for a single-family residence located at the intersection of Sierra Vista Way and Sessions Road (Lot 66 Tract 5332), APN 232-052-019	)	Resolution 2009-05

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LAFAYETTE UPHOLDING AN APPEAL BY LAMORINDA PROPERTIES OF THE PLANNING COMMISSION'S DENIAL OF HDP47-07 AND V17-08 AND APPROVING THE PROJECT HDP47-07 AND V17-08

RECITALS

A. On November 14, 2007, Richard Holt filed an application for a siting and massing determination for a new single-family residence in the Hillside Overlay District located at the intersection of Sierra Vista Way and Sessions Road (Tract 5332 Lot 66). The project site is located in the R-10 zoning district.

B. On June 5, 2008 and July 3, 2008 the Planning Commission, following notification to the public in the prescribed manner, conducted public hearings where it received written and oral testimony including written staff reports dated June 5, 2008 and July 3, 2008. The Planning Commission considered the application and continued the matter to allow the applicant to submit a redesigned project.

C. On August 21, 2008, Richard Holt filed V17-08, a request for a variance to yard setbacks.

D. On August 21, 2008, the Planning Commission conducted a public hearing where it received written and oral testimony including a written staff report dated August 21, 2008. The Planning Commission considered the applications and continued the matter to September 4, 2008.

E. On September 4, 2008, the Planning Commission conducted a public hearing where it received written and oral testimony including a written staff report dated September 4, 2008 recommending approval of HDP47-07 and V17-08. The Planning Commission considered the application, directed staff to prepare a resolution denying HDP47-07 and V17-08 because they could not make the required findings, and continued matter to September 18, 2008.

F. On September 18, 2008, the Planning Commission adopted Planning Commission Resolution 2008-22 denying HDP47-07 and V17-08 for a siting and massing determination and variance to yard setbacks for a new single-family residence in the Hillside Overlay District.

G. On September 29, 2008, David Bowie filed a timely appeal on behalf of his client, Lamorinda Properties, of the Planning Commission's denial without prejudice of HDP47-07 and V17-08.

H. On November 10, 2008, the City Council, following notification to the public in the prescribed manner, conducted a de novo public hearing on the appeal where it received written and oral testimony including a written staff report dated November 10, 2008. The staff report included, but was not limited to, minutes, staff reports, exhibits, and correspondence from five Planning Commission meetings as well as supplemental correspondence and exhibits submitted by the City Attorney, the applicant, and the public. The City Council considered the appeal and continued the matter to December 8, 2008.

I. On December 8, 2008, the City Council conducted a de novo public hearing on the appeal where it received written and oral testimony including a written staff report dated December 8, 2008. The City Council considered the appeal and continued the matter to January 26, 2009 to allow the applicant to submit a redesigned project.

J. On January 26, 2009, the City Council conducted a de novo public hearing on the appeal where it received written and oral testimony including a written staff report dated January 26, 2009. After considering the matter, the City Council voted to uphold the appeal by Lamorinda Properties of the Planning Commission's denial of HDP47-07 and V17-08 for a siting and massing determination and variance for a single-family residence and approve the applications.

K. As noted in oral and written testimony during the various public hearings, there is a dispute between the property owner and the neighbors regarding the nature of a non-exclusive access and utility easement on the property and whether this easement encumbers the entire property ("Disputed Easement"). The Disputed Easement is a legal dispute between the property owner and the easement holders. The City Council in making its determination on the appeal and applications takes no position and makes no determination on the Disputed Easement.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF LAFAYETTE, CALIFORNIA, FINDS AND DETERMINES AS FOLLOWS:

Section I
Findings of Fact

All of the findings and conclusions made by the City Council pursuant to this Resolution are based upon substantial evidence in the entire record before the City Council, and are not based solely on the information provided in this Resolution.

Section II
California Environmental Quality Act

The proposed project has been determined to be exempt from the California Environmental Quality Ac because it is only a determination on a potential building site and is covered under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Any future plans to develop the property will be subject to CEQA review on its own merits.

Section III
Specific Findings Necessary for a Variance Pursuant to Section 6-214, Lafayette Municipal Code

The City Council has evaluated the findings necessary for a variance pursuant to Section 6-214, Lafayette Municipal Code, as follows:

A variance may only be granted when:

1. Because of special circumstances concerning the subject property, including size, shape, topography, location or surroundings, the strict application of the zoning regulations deprives the property of privileges enjoyed by other properties in the vicinity and in the same land use district. The special circumstances which concern this property are that it is bisected by Sessions Road and a 50-foot wide City of Lafayette trail easement serving the public good. Steep topography further constrains the area for development. Application of a 15-foot setback from the trail easement would leave a maximum building area width of only 25 feet. Corner lots within the R-10 district can accommodate houses 50 feet or more in width. Additionally, the variance will not have a direct impact on the trail because the trail through the subject property is on the paved portion of Sessions Road. Development is set back more than 20 feet from the paved road/trail.

2. The variance will not constitute a grant of special privilege which is not generally available to other property in the vicinity and in the same land use district because construction of a single-family home is a privilege shared by others and allowed in the R-10 zoning district. Other property owners faced with application of yard setbacks from not only property lines but from access easements would be granted the same concessions as long as the proposed project did not unduly interfere or impact the access easement.

3. The variance substantially complies with the intent and purpose of the land use district in which the property is classified because the applicant is requesting a variance to construct a single-family home which is a permitted use in the R-10 zoning district. Other that the request to reduce the side yard on this corner lot, the development complies with all other development standards of the R-10 zoning district including building height, front and rear yard setbacks, and provision of two on-site, covered parking spaces.

Section IV
Findings Required for Approval of a Hillside Development Permit on an Existing Lot of Record Pursuant to Section 6-2071, Lafayette Municipal Code

The City Council has evaluated the findings required for approval of a hillside development permit on an existing lot of record pursuant to section 6-2017, Lafayette Municipal Code, as follows:

The hearing authority may approve an application for a hillside development permit on an existing lot of record in the hillside overlay district only after making the following findings:

a. The development is consistent with the applicable goals and policies of the general plan and is in conformance with applicable zoning regulations because as designed, the project conforms to the density allowed by the Medium Density Single Family Residential General Plan designation which allows up to six dwelling units per acre. The project is infill development and will be served by public services and utilities. With approval of a variance to the setback from the trail easement, the project conforms to the development standards of the R-10 zoning district including building height, front and rear yard setbacks, and provision of two on-site, covered parking spaces.

b. The development will preserve open space and physical features, including rock outcroppings and other prominent geological features, streams, streambeds, ponds, drainage swales, native vegetation, native riparian vegetation, animal habitats and other natural features because no prominent geological features, streams, streambeds, or ponds will be impacted by the project. The existing swale will be replaced with a system of open and closed channels and will be designed to mitigate any potential drainage impacts from the project development. Proposed development affects only a limited area of the 26,340 square foot parcel. The open, western slope will remain undeveloped except for the possible planting of native oak trees to mitigate the removal of the non-indigenous trees and vegetation in the development area. No vegetation indigenous to Lafayette will be removed.

c. Structures in the hillside overlay district will, to the extent feasible, be located away from prominent locations such as ridgelines, hilltops, knolls and open slopes because although located in the Hillside Overlay District, the proposed single-family residence is not located near any prominent ridgeline, hilltop, knoll, or open slope.

d. The development, including site design and the location and massing of all structures and improvements will, to the extent feasible:

   1. Minimize the loss of privacy to surrounding residents and not unduly impact, restrict or block significant views;
   2. Not have a significant visual impact when viewed from lower elevations from public places, using the viewing evaluation map as a guide to establish locations from which views are considered; and
   3. Not interfere with a ridgeline trail corridor or compromise the open space or scenic character of the corridor.

   The issue of privacy between the subject property and the adjacent property to the east ("Swarts") has been addressed by the applicant to the maximum extent feasible. The rear

of the Swarts house, which has no windows, is 25 feet from the corner of the proposed garage. There is a retaining wall approximately five feet from the rear of the Swarts house and then the terrain rises steeply upward at a 2:1 slope. The eastern elevation of the proposed house faces this slope and not the Swarts home. Additionally, windows on the eastern elevation are placed five to six feet above the floor line providing light but not direct views down and south to the Swarts home. The proposed house is set back 15 feet from the eastern property line where only 10 feet is required by the Zoning Ordinance.

The proposed development was evaluated using the list of public places from the City's viewing evaluation map. Listed locations used to evaluate visual impacts included Deer Hill Road, First Street, Highway 24, Sessions Road, Sierra Vista Way, and the BART station and parking lot. Due to its location within a developed residential area with varied topography and mature vegetation, there is no visibility of the project site from off-site locations such as Deer Hill Road, First Street, Highway 24 or the BART station. The site is highly visible from Sessions Road and Sierra Vista Way, as are most of the other developed properties on these streets. However, the purpose of the Viewing Evaluation Map is to establish locations from which views of open and highly visible portions of Lafayette's scenic hillsides and ridgelines can be seen when viewed from below the proposed development. This is not the case with this project.

A 50-foot wide trail easement bisects the project site. This easement contains the Petar Jakovina Trail which follows the paved roadway as it passes through the project site. As designed, the project will not impact public access to the Trail which is designated for hiking only. The proposed house is at least 20 feet from the paved road/trail.

e. Within 100 feet of a restricted ridgeline area, or when an exception to a ridgeline setback has been granted, the development will result in each structure being substantially concealed by terrain or vegetation when viewed from lower elevations from public places, using the viewing evaluation map as a guide to establish locations from which views are considered. This finding is not applicable to this project.

f. Development grading will be minimized to limit scarring and cutting of hillsides especially for long roads or driveways, preserve existing geologic features, topographic conditions and existing vegetation, reduce short and long-term erosion, slides and flooding, and abate visual impacts. Development grading has been minimized by terracing the building and using foundation walls to bunker the building into the slope. Grading for the driveway is limited to that necessary to provide access to the garage and to provide for adequate turnaround so vehicles can enter Sessions Road without backing into the roadway.

g. The development provides adequate emergency vehicle access, including turn-around space, to the building site and surrounding on-site undeveloped or isolated areas. Access to the site is provided by Sierra Vista Way and Sessions Road. The Contra Costa County Fire Protection District did not identify any problems with emergency access, driveway or roadway grades, or fire apparatus turnaround.

h. Each structure and proposed landscaping complies with the city's residential design guidelines because the massing and siting of the project is appropriate for this location. The building has been stepped with terrain presenting one- and two-story elements and differentiated rooflines when approached from lower Sessions Road. Foundation

retaining walls are used to bunker and set the building into the grade. No landscaping is proposed for this phase 1 application.

i. The new or replacement vegetation for the development is native to the surrounding area in areas abutting open space and natural areas, such as oak woodland, chaparral, grassland and riparian areas, and conforms to the policies of Section 6-2051. This finding is not applicable to this phase 1 hillside development application although the project is conditioned to provide a landscape plan for phase 2 utilizing native, evergreen trees and shrubs.

j. The development will not create a nuisance, hazard or enforcement problem within the neighborhood or the city, nor require the city to provide an unusual or disproportionate level of public services because the project site is an existing lot in a planned subdivision served by public and private streets and will be served by public services and utilities. The proposed development has been reviewed by the Contra Costa County Fire Protection District, the City Engineer, and the City traffic consultant. The Contra Costa County Fire Protection District did not identify any problems with emergency access, driveway or roadway grades, fire apparatus turnaround or any other problems or deficiencies that would create a nuisance or hazard or require the provision of an unusual or disproportionate level of service. The City Engineer reviewed the Preliminary Geotechnical Reconnaissance Report and drainage study and preliminary drainage plan prepared for the project. The City Engineer agrees with the conclusions, recommendations, and preliminary plans and, as conditioned, project development will not create a nuisance or hazard related to geology, soils, drainage, or water quality. The City traffic consultant did not identify any traffic related hazards which could result from this phase 1 application.

Section V
Approval of HDP47-07, V17-08 and Conditions of Approval

Based on the above recitals and findings, the City Council hereby approves HDP47-07 and V17-08 for a phase 1 siting and massing determination for a single-family residence in the Hillside Overlay District as shown on the site plan dated received January 15, 2009, subject to the conditions of approval detailed in Exhibit A attached to this Resolution. In approving the applications, the City Council takes no position and makes no determination on the Disputed Easement.

PASSED AND ADOPTED by the City Council of the City of Lafayette at a meeting held on January 26, 2009 by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

ATTEST: APPROVED:

Joanne Robbins, City Clerk

Don Tatzin, Mayor

EXHIBIT A – CONDITIONS OF APPROVAL

CITY COUNCIL RESOLUTION 2009-05

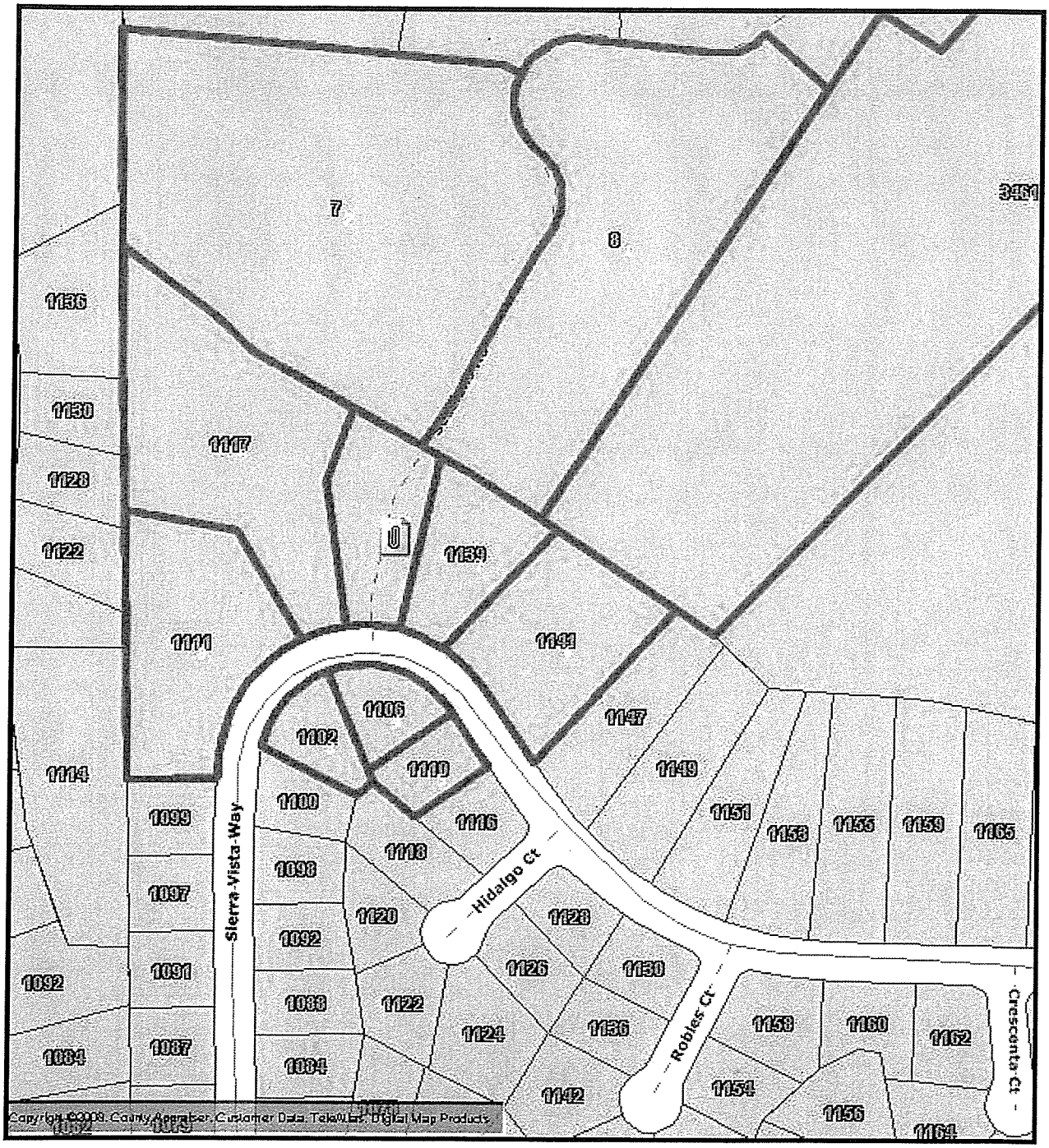
HDP47-07 AND V17-08
LOT 66, TRACT 5332, LOCATED AT THE INTERSECTION OF SIERRA VISTA WAY AND SESSIONS ROAD; APN 232-052-019

	CONDITIONS	FOR STAFF USE ONLY
1.	Pursuant to §6-2073 of the Lafayette Municipal Code, this approval shall expire one year from the approval date unless an Application 2 – Hillside Development Permit is submitted and deemed complete by the Planning Services Division. The Planning and Building Services Manager may extend the period to exercise the permit for up to one additional year, upon a showing of good cause, if such request is received in writing prior to the expiration date.	General or ongoing condition.
2.	The following conditions of approval shall be applicable to the future site plan and design for an Application 2 – Hillside Development Permit unless otherwise modified by the Planning Services Division and/or City Council.	General or ongoing condition.
3.	Development proposed in the Application 2 – Hillside Development Permit shall conform to the approved site and massing plans, dated received January 15, 2009, on file at the City Offices unless modified by these conditions. Windows on the eastern elevation shall be designed to provide light and ventilation but not direct views down and south to the adjoining residence.	General or ongoing condition.
4.	Development proposed in the Application 2 – Hillside Development Permit shall comply with the recommendations of the arborist reports prepared by Baefsky & Associates, dated July 6, 2007 and April 1, 2008 subject to the findings in the updated arborist report required by condition 8, below.	____ Satisfied Date: _____ Staff: _____
5.	The following materials and exhibits shall be included with the Application 2 – Hillside Development Permit submittal. a. Plans shall include not only house designs but all proposed exterior improvements including, but not limited to, landscaping, fencing, and outbuildings and amenities such as spas, fireplaces and fixed barbeques. b. No improvements or structures including retaining walls, fences, and stairways, shall be higher than six feet within the yard setback from the trail easement. c. A landscape plan utilizing native, evergreen plants to conceal the buildings to the maximum extent feasible and provide privacy screening for the property at 1139 Sierra Vista Way. Grouping of plants shall be in natural appearing clusters and straight rows of trees and shrubs avoided. Landscaping plans shall be designed to prevent surface runoff downslope.	____ Satisfied Date: _____ Staff: _____

	d. Proposed location for the East Bay type hydrant required by the Contra Costa County Fire Protection District.	
6.	The Application 2 – Hillside Development Permit shall include a project specific geotechnical report including, but not limited to, geotechnical borings or exploratory pits, laboratory testing of materials recovered from the borings or test pits, and engineering analyses of foundations and improvements. The subsurface exploration program shall focus on evaluating the possible presence of landslide debris beneath the building site and recommendations for remedial measures if needed.	____ Satisfied Date: _____ Staff: _____
7.	The Application 2 – Hillside Development Permit shall include a detailed drainage and stormwater quality control plan based on hydrological data. At a minimum, these plans shall mitigate any identified impacts from site development.	____ Satisfied Date: _____ Staff: _____
8.	The Application 2 – Hillside Development Permit shall be subject to the provisions of the California Environmental Quality Act (CEQA). The Application 2 – Hillside Development Permit submittal shall include an updated tree survey and tree protection plan, reconnaissance level study for special status species, and construction traffic management plan.	____ Satisfied Date: _____ Staff: _____
9.	The applicant shall defend, indemnify and hold harmless the City of Lafayette, (its agents, officers and employees) from an action, or proceeding against the City that attacks or seeks to, set aside this approval, if the action or proceeding is brought within the applicable time period of Government Code Section 65009. If the City is aware of such action or proceeding it shall promptly notify the applicant and cooperate fully in the defense. If the City fails to promptly notify the applicant, or fails to cooperate fully in the defense, the applicant is not thereafter responsible to defend, indemnify or hold the City harmless. This condition does not prohibit the City from participating in the defense of the action, or proceeding, if both of the following occur: (1) the City bears its own attorney's fees and costs; and (2) the City defends the action in good faith. In this condition "applicant" means each person who qualifies as an applicant as that term is defined in L.M.C. sections 6-203.[1]	General or ongoing condition.

End

[1] An applicant is a person who has either (a) a freehold interest in the subject land, (b) a possessory interest in that land that entitles him to exclusive possession, or (c) a contractual interest which is specifically enforceable and thereby may become a freehold or exclusive possessory interest. Applicant also includes an authorized agent.



LAFAYETTE

HDP47-07

Sierra Vista Way

N

150m

CityGIS

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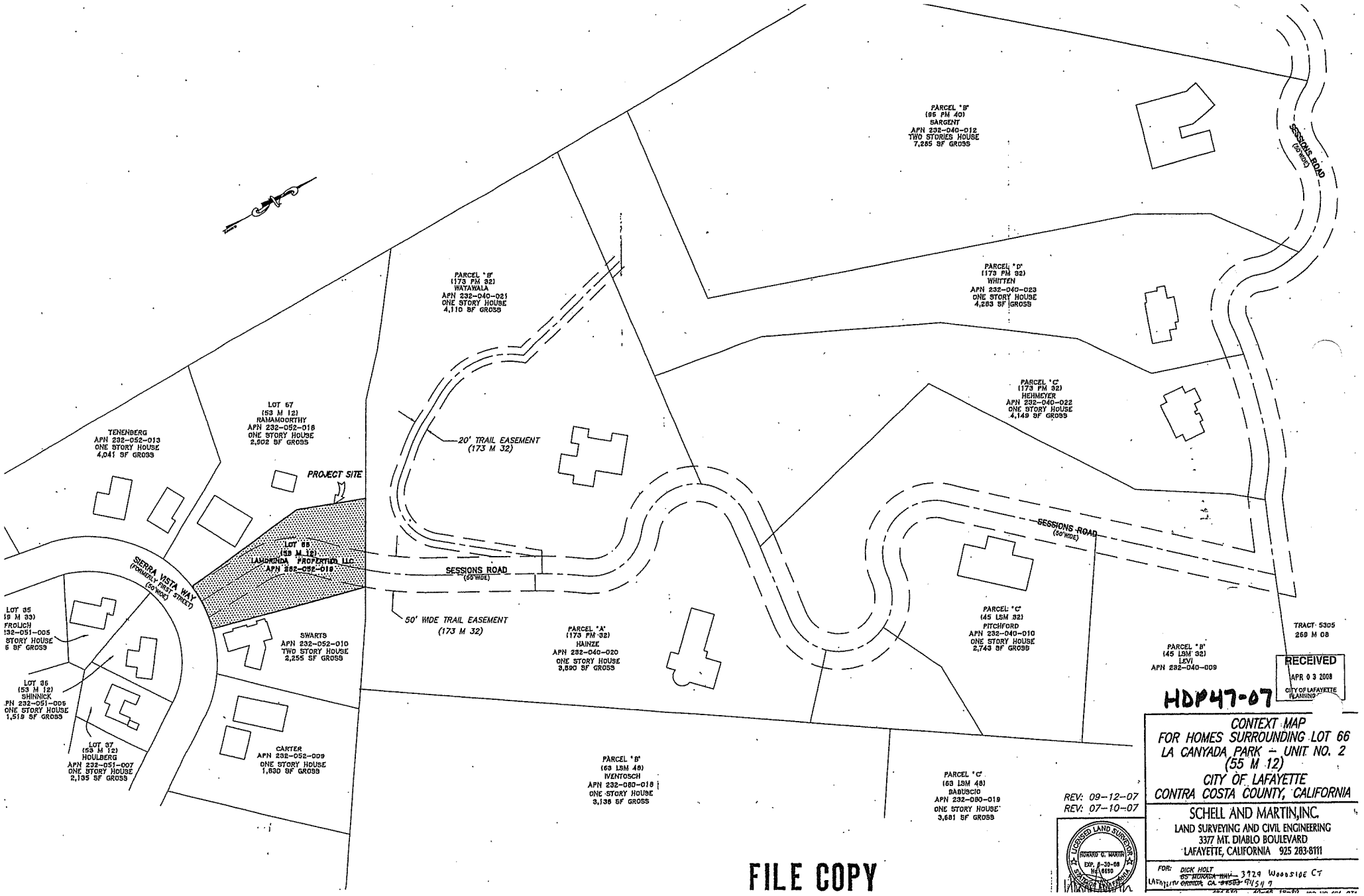

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APR 0 3 2008
CITY OF LAFAYETTE
PLANNING

HDP47-07

CONTEXT MAP
FOR HOMES SURROUNDING LOT 66
LA CANYADA PARK - UNIT NO. 2
(55 M 12)
CITY OF LAFAYETTE
CONTRA COSTA COUNTY, CALIFORNIA

REV: 09-12-07
REV: 07-10-07

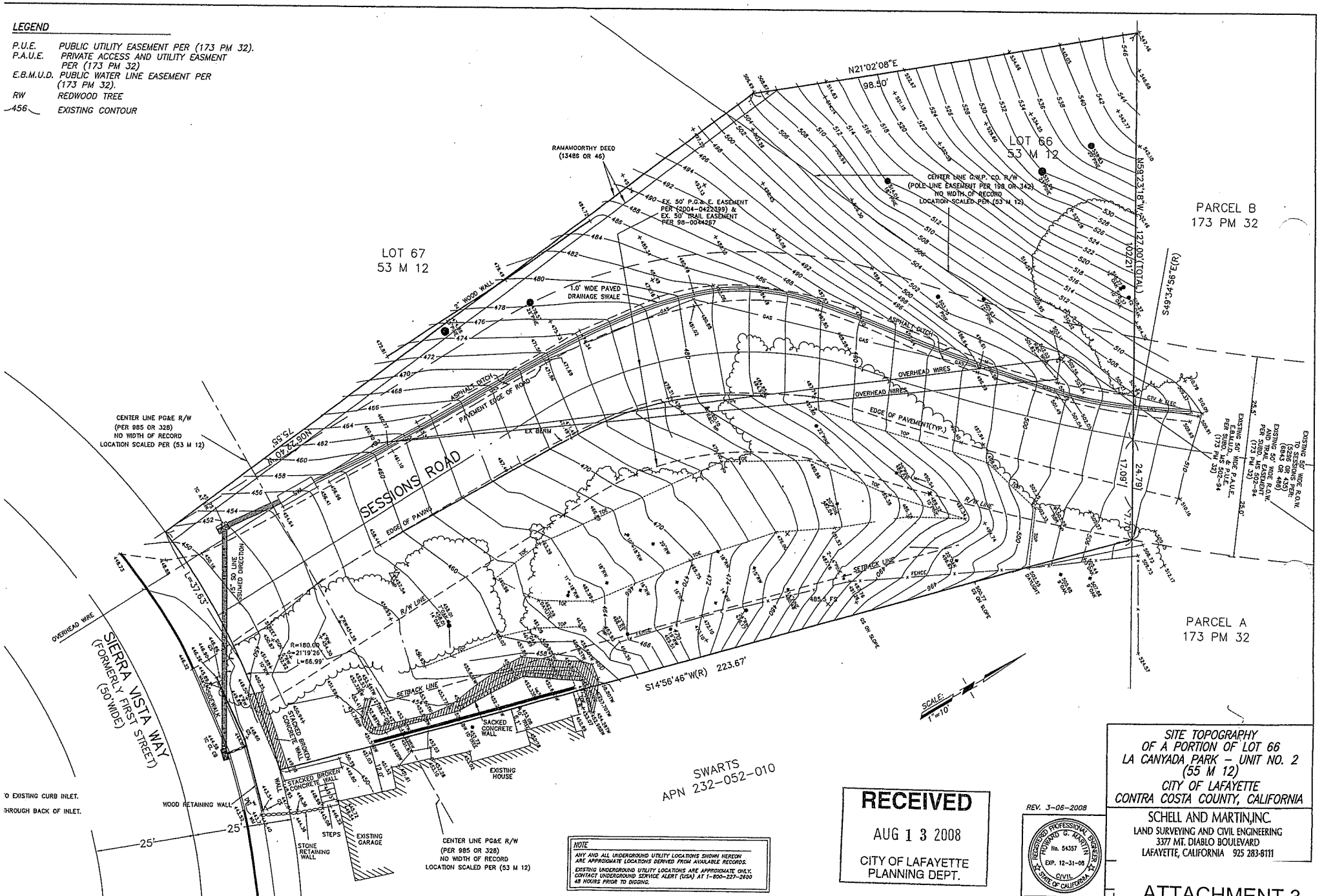
LICENSED LAND SURVEYOR
HOWARD G. MARTIN
EXP. 6-30-08
No. 6650
STATE OF CALIFORNIA

SCHELL AND MARTIN, INC.
LAND SURVEYING AND CIVIL ENGINEERING
3317 MT. DIABLO BOULEVARD
LAFAYETTE, CALIFORNIA 925 283-8111

FOR: DICK HOLT
65 MORAGA WAY 3729 Woodside Ct
LAFAYETTE ORINDA, CA 94563-9154 9

FILE COPY

ATTACHMENT 2



NOTE
ANY AND ALL UNDERGROUND UTILITY LOCATIONS SHOWN HEREON ARE APPROXIMATE LOCATIONS DERIVED FROM AVAILABLE RECORDS.
EXISTING UNDERGROUND UTILITY LOCATIONS ARE APPROXIMATE ONLY. CONTACT UNDERGROUND SERVICE ALERT (USA) AT 1-800-227-2600 48 HOURS PRIOR TO DIGGING.

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AUG 13 2008
CITY OF LAFAYETTE
PLANNING DEPT.

REV. 3-06-2008

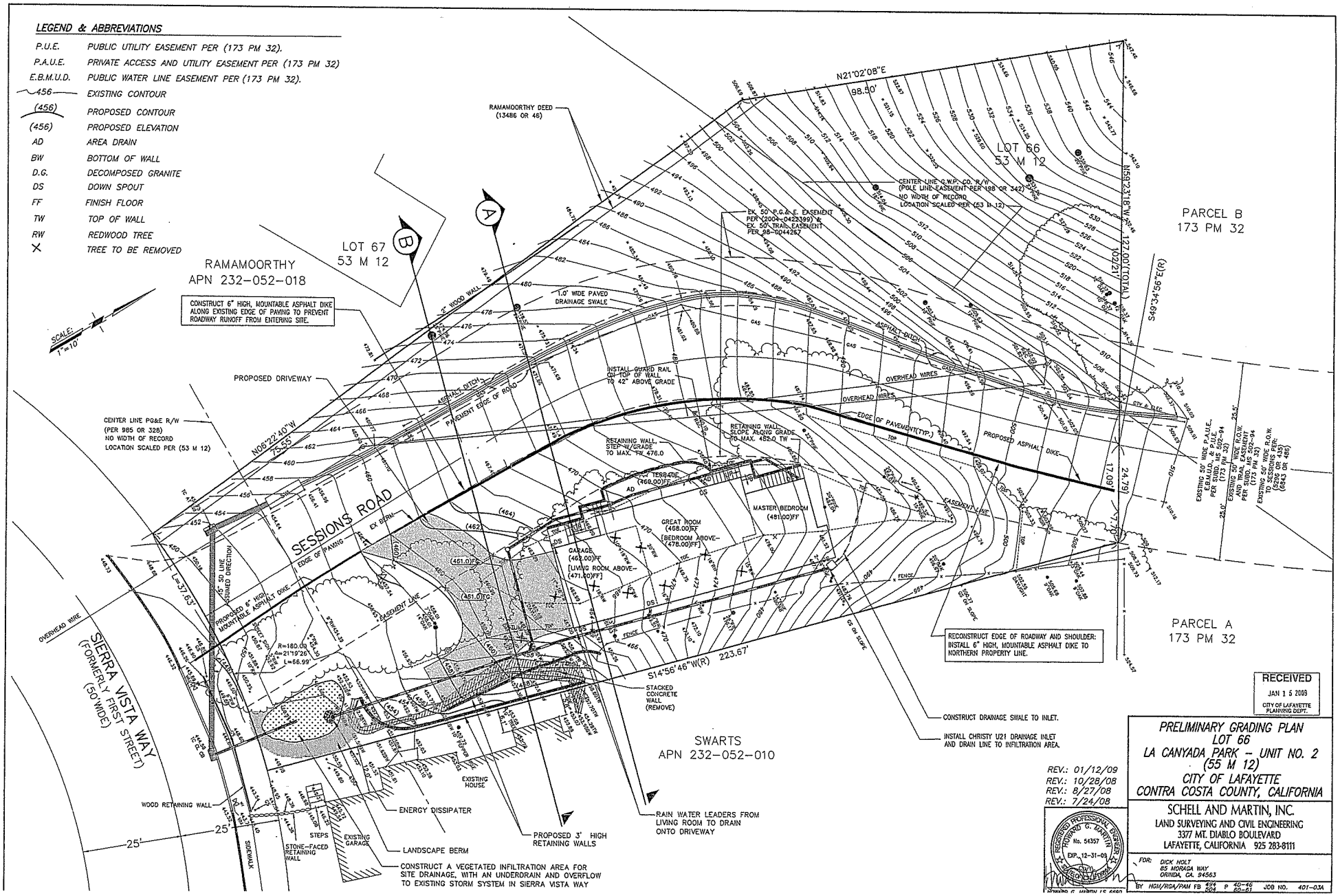
REGISTERED PROFESSIONAL ENGINEER
HOWARD G. MARTIN
No. 54357
EXP. 12-31-08
CIVIL
STATE OF CALIFORNIA

HOWARD G. MARTIN LS 6690
EXP. DATE 12-31-08

SITE TOPOGRAPHY
OF A PORTION OF LOT 66
LA CANYADA PARK – UNIT NO. 2
(55 M 12)
CITY OF LAFAYETTE
CONTRA COSTA COUNTY, CALIFORNIA

SCHELL AND MARTIN, INC.
LAND SURVEYING AND CIVIL ENGINEERING
3377 MT. DIABLO BOULEVARD
LAFAYETTE, CALIFORNIA 925 283-8111

ATTACHMENT 3


LEGEND & ABBREVIATIONS
P.U.E. PUBLIC UTILITY EASEMENT PER (173 PM 32).
P.A.U.E. PRIVATE ACCESS AND UTILITY EASEMENT PER (173 PM 32)
E.B.M.U.D. PUBLIC WATER LINE EASEMENT PER (173 PM 32).
456 EXISTING CONTOUR
(456) PROPOSED CONTOUR
(456) PROPOSED ELEVATION
AD AREA DRAIN
BW BOTTOM OF WALL
D.G. DECOMPOSED GRANITE
DS DOWN SPOUT
FF FINISH FLOOR
TW TOP OF WALL
RW REDWOOD TREE
TREE TO BE REMOVED
SCALE: 1"=10'
RAMAMOORTHY APN 232-052-018
LOT 67 53 M 12
LOT 66 53 M 12
PARCEL B 173 PM 32
PARCEL A 173 PM 32
SWARTS APN 232-052-010
SESSIONS ROAD
SIERRA VISTA WAY (FORMERLY FIRST STREET) (50' WIDE)
CONSTRUCT 6" HIGH, MOUNTABLE ASPHALT DIKE ALONG EXISTING EDGE OF PAVING TO PREVENT ROADWAY RUNOFF FROM ENTERING SITE.
RECONSTRUCT EDGE OF ROADWAY AND SHOULDER: INSTALL 6" HIGH, MOUNTABLE ASPHALT DIKE TO NORTHERN PROPERTY LINE.
PROPOSED DRIVEWAY
CENTER LINE PG&E R/W (PER 985 OR 328) NO WIDTH OF RECORD LOCATION SCALED PER (53 M 12)
N06°22'40"W 75.55'
N21°02'08"E 98.80'
N59°23'18"W 127.00'(TOTAL)
S49°34'56"E(R)
S14°56'46"W(R) 223.67'
RAMAMOORTHY DEED (13486 OR 46)
CENTER LINE G.W.P. CO. R/W (POLE LINE EASEMENT PER 198 OR 342) NO WIDTH OF RECORD LOCATION SCALED PER (53 M 12)
EX. 50' P.G.&E. EASEMENT PER (2004-0423399) & EX. 50' TRAIL EASEMENT PER 98-0044267
1.0' WIDE PAVED DRAINAGE SWALE
2' WOOD WALL
ASPHALT DITCH
INSTALL GUARD RAIL ON TOP OF WALL TO 42" ABOVE GRADE
OVERHEAD WIRES
EDGE OF PAVEMENT(TYP.)
PROPOSED ASPHALT DIKE
RETAINING WALL, STEP-N/GRADE TO MAX. TW 476.0
RETAINING WALL, SLOPE ALONG GRADE TO MAX. 452.0 TW
TERRACE (468.00)FF
GREAT ROOM (468.00)FF [BEDROOM ABOVE-(478.00)FF]
MASTER BEDROOM (481.00)FF
GARAGE (462.00)FF [LIVING ROOM ABOVE-(471.00)FF]
EASEMENT LINE
FENCE
EXISTING 50' WIDE P.A.U.E., E.B.M.U.D. & P.U.E. PER SUBD. MS 652-94 (173 PM 32)
EXISTING 50' WIDE R.O.W. AND P.U.E. EASEMENT PER SUBD. MS 652-94 (173 PM 32)
EXISTING 50' WIDE R.O.W. TO BE VACATED PER (5283 OR 45) (6843 OR 466)
17.09'
24.79'
25.6'
PROPOSED 6" HIGH MOUNTABLE ASPHALT DIKE
SD LINE DIVERSION DIRECTION
R=160.00' Δ=21°19'26" L=66.99'
L=37.63'
OVERHEAD WIRE
STACKED CONCRETE WALL (REMOVE)
CONSTRUCT DRAINAGE SWALE TO INLET.
INSTALL CHRISTY U21 DRAINAGE INLET AND DRAIN LINE TO INFILTRATION AREA.
EXISTING HOUSE
WOOD RETAINING WALL
ENERGY DISSIPATER
STEPS
STONE-FACED RETAINING WALL
EXISTING GARAGE
LANDSCAPE BERM
SIDEWALK
PROPOSED 3' HIGH RETAINING WALLS
RAIN WATER LEADERS FROM LIVING ROOM TO DRAIN ONTO DRIVEWAY
CONSTRUCT A VEGETATED INFILTRATION AREA FOR SITE DRAINAGE, WITH AN UNDERDRAIN AND OVERFLOW TO EXISTING STORM SYSTEM IN SIERRA VISTA WAY
25'
REGISTERED PROFESSIONAL ENGINEER HOWARD G. MARTIN No. 54357 EXP. 12-31-09 CIVIL STATE OF CALIFORNIA

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REV.: 01/12/09
REV.: 10/28/08
REV.: 8/27/08
REV.: 7/24/08

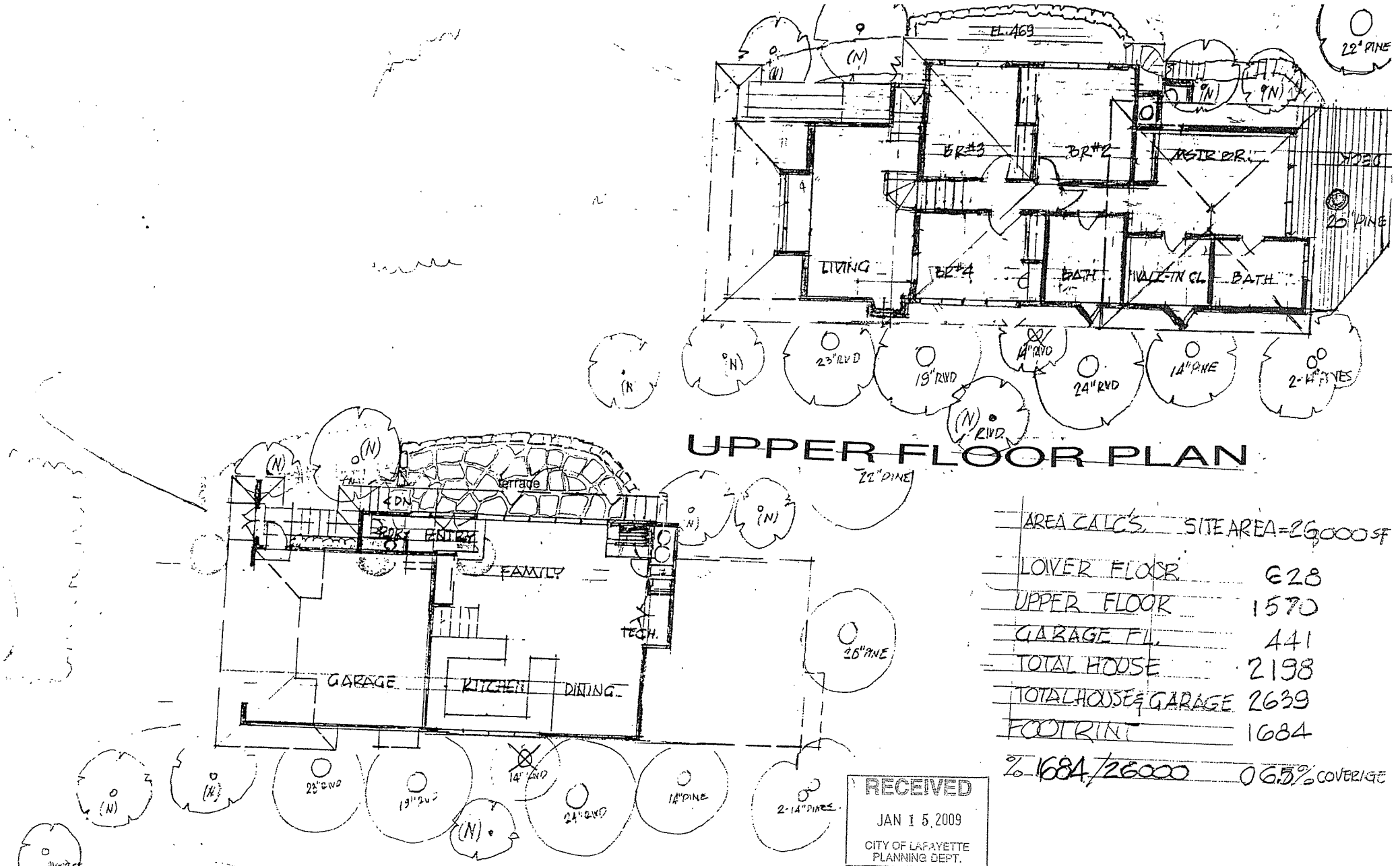
PRELIMINARY GRADING PLAN
LOT 66
LA CANYADA PARK - UNIT NO. 2
(55 M 12)
CITY OF LAFAYETTE
CONTRA COSTA COUNTY, CALIFORNIA

SCHELL AND MARTIN, INC.
LAND SURVEYING AND CIVIL ENGINEERING
3377 MT. DIABLO BOULEVARD
LAFAYETTE, CALIFORNIA 925 283-8111

FOR: DICK HOLT
65 MORAGA WAY
ORINDA, CA. 94563

BY HGM/RGA/PAM FB 454 504 P 40-46 60-61 JOB NO. 401-03A

C:\EVPROJECTS\Work2009\401-03A\WK1 PRELIMINARY GRADING PLAN 01-12-09.dwg Wed Jan 14 16:57:18 2009



AREA CALC'S	SITE AREA = 26,000 SF
LOWER FLOOR	628
UPPER FLOOR	1570
GARAGE FL.	441
TOTAL HOUSE	2198
TOTAL HOUSE & GARAGE	2639
FOOTPRINT	1684
% 1684/26000	06.5% COVERAGE

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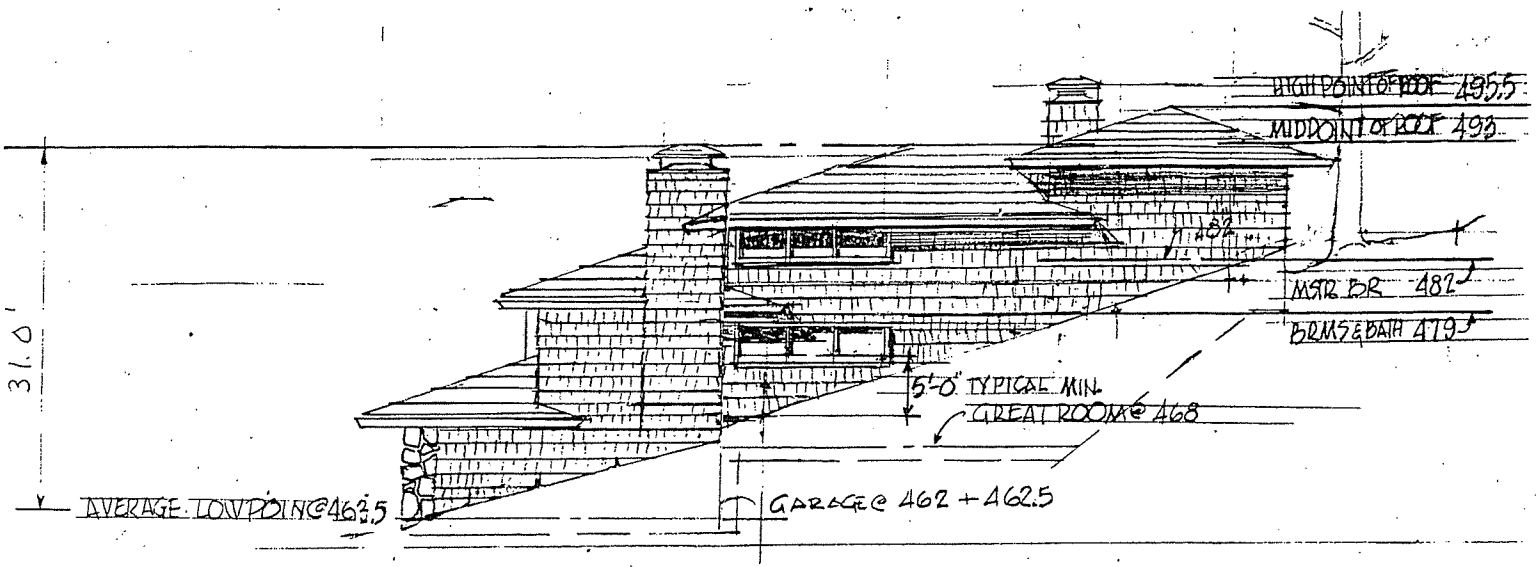
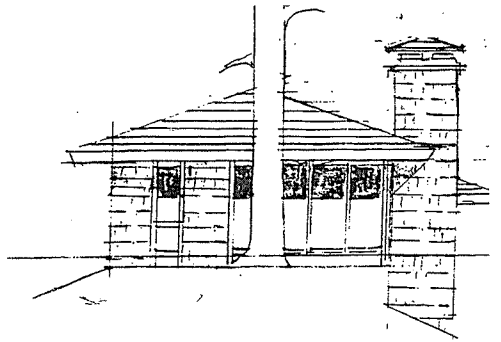
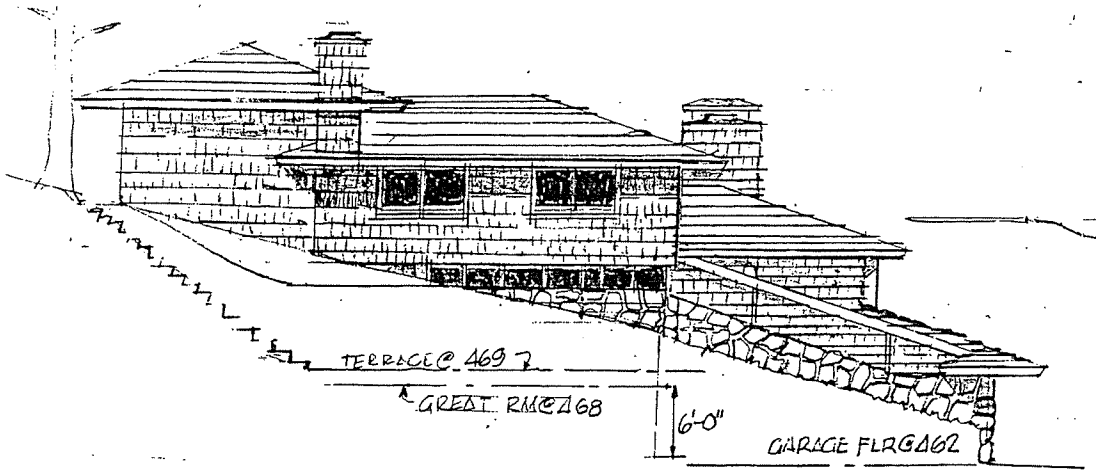
HOLT RESIDENCE



EAST ELEVATION

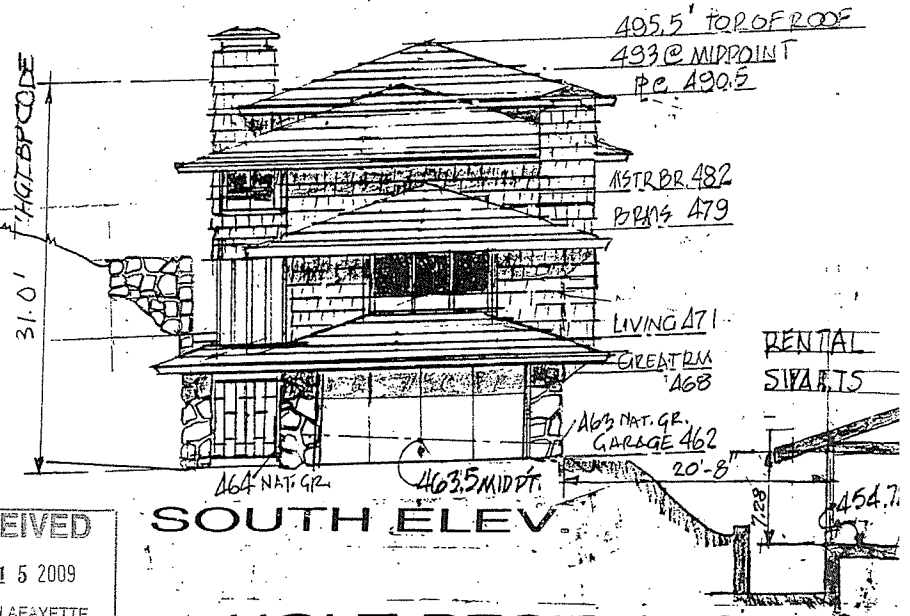


NORTH ELEV



WEST ELEVATION

SCALE 1IN. EQUALS 10 FT.



SOUTH ELEV.

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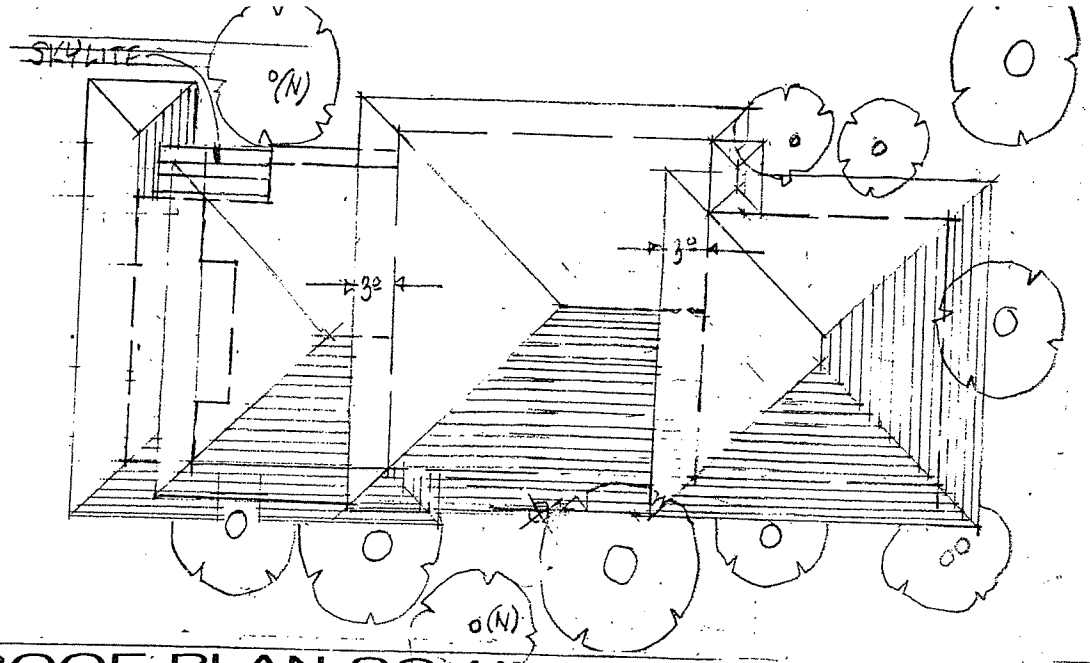
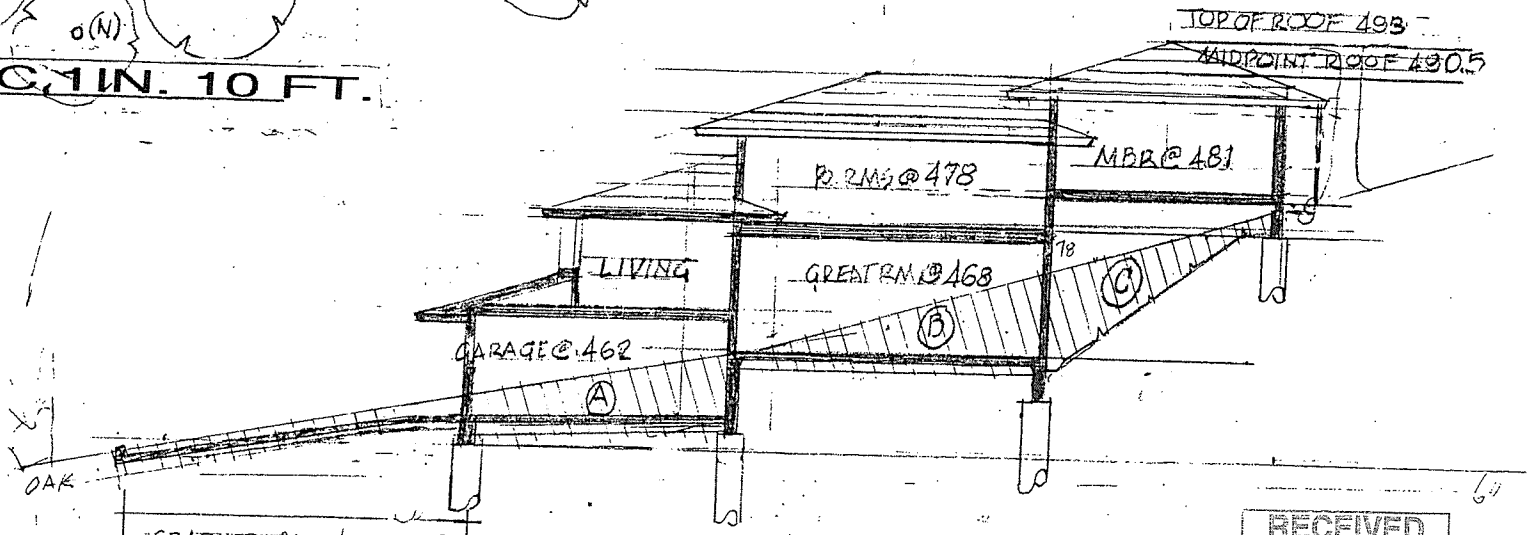
HOLT RESIDENCE



ROOF PLAN SCALE IN. 10 FT.



GRADING CALC'S - CUT

(A) 2×8×8 + 2/3×6×8 = 164 C.Y.

(B) 2×8×8 = 128 C.Y.

(C) 1/2×12×8 = 144 C.Y.

TOTAL CUT = 436 C.Y.

SECTION A

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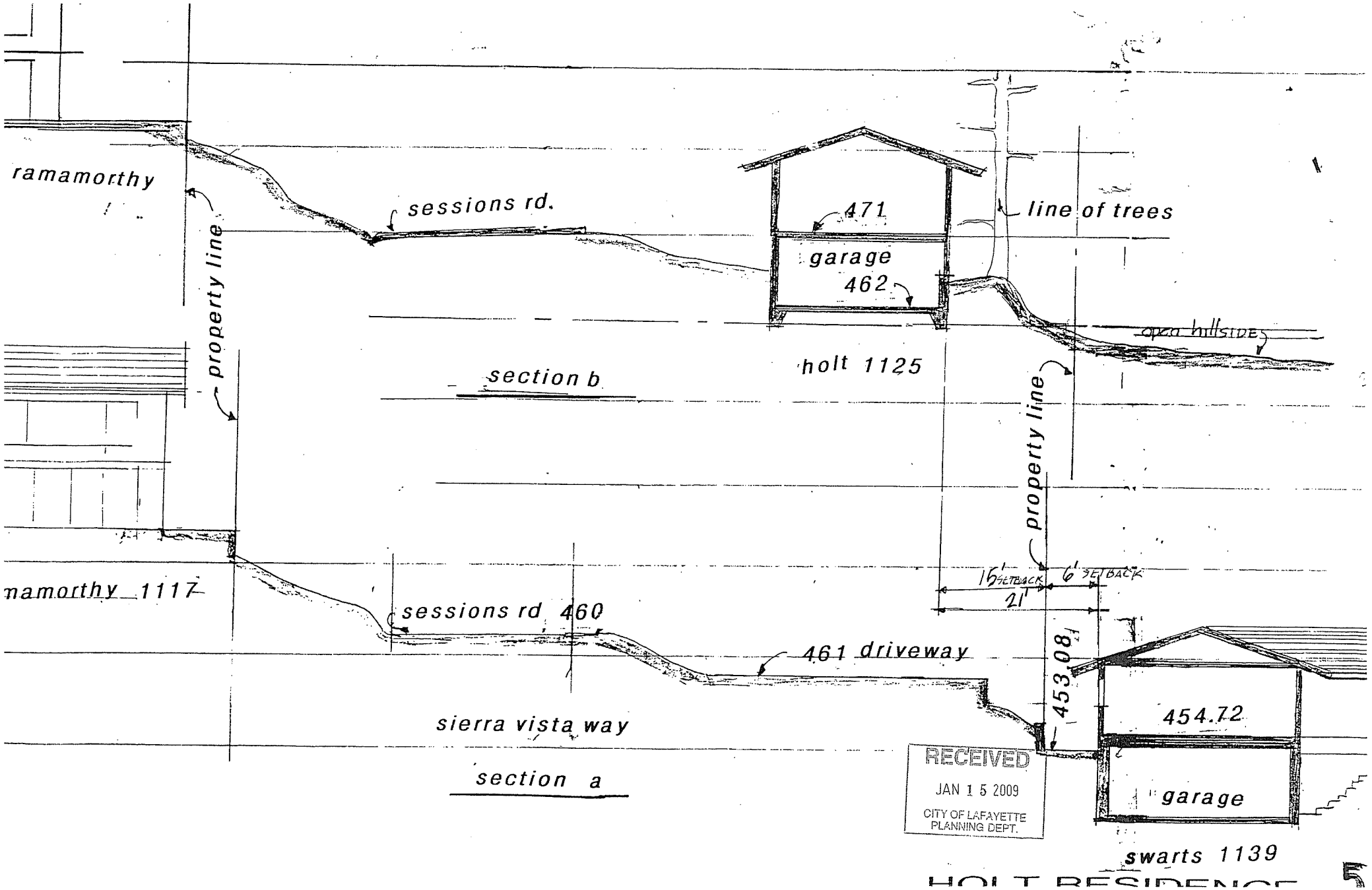
HOLT RESIDENCE


ramamorthy
property line
sessions rd.
471
garage
462
line of trees
open hillside
holt 1125
section b
property line
15' SETBACK
6' SETBACK
21'
namorthy 1117
sessions rd 460
461 driveway
453.08
454.72
garage
sierra vista way
section a
swarts 1139
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PLANNING DEPT.

model showing revised building elevation 11/09

Councilmember Anderson recommended that staff take the Scope of Work starting on page 8 and move it to the front of the document.

There was no public comment.

Mayor Tatzin felt one option would be to ask the Public Safety Subcommittee of the Council to review another Draft RFP, provide feedback, and work further with the interested cities.

ACTION: It was the consensus of the Council to direct the City Manager to meet with the Public Safety subcommittee before the Police Services Study Request for Proposals is issued.

10. PUBLIC HEARINGS

A. Christine Sinnette, Senior Planner

Appeal by Richard Holt of the Planning Commission denial of HDP47-07 and V17-08 for a request for a hillside development permit (HDP47-07) and variances (V17-08) to build a new two-story single family residence on a lot located at the intersection of Sierra Vista Way and Sessions Road (Tract 5332 Lot 66). APN 2332-052-019

Recommendation: Accept public testimony, consider the recommendations of the Planning Commission and staff, provide direction to staff, and continue the hearing to January 12, 2009.

Mayor Tatzin reported that he did not attend the previous Council meeting when the item was heard, has since reviewed the material, visited the site, read the minutes, and said he would participate on the matter.

Senior Planner Christine Sinnette said the matter is an appeal of the Planning Commission's denial of a hillside development permit and a variance, and was continued from the meeting of November 10th. The Planning Commission held 5 hearings on the application and at various times gave direction to the applicant to reduce the size of the building, set the building farther up the hill, change driveway locations and consider alternative parking schemes. The Council received a complete package of these hearings in the last Council packet.

The current plans differ from the project denied by the Planning Commission. The plans the Commission denied were for a 2,700 square foot home, 30 feet high, which started at the 464 foot contour interval. The current plan is for 2,898 square feet, is also 30 feet high but starts at the 463 contour interval. The driveway is in the same location as the previous plan. The building is now set back 15 feet from the eastern property line and 20 feet away from the building next door.

The current proposal continues to show a building mass designed to step up with the terrain, presenting one and two story elements and differentiated roof lines when approached from lower Sessions Road. Foundation walls are used to bunker and set the building into the hillside and an outdoor living area would be provided by a terrace that overlooks Sessions Road and via a deck at the rear. The property itself is heavily wooded and consists primarily of Canary Pine and redwood trees with scattered oaks and Italian Stone Pine and California Pepper. Development would require approval of a Category II Tree Removal Permit to remove protected trees, which are those with a trunk diameter of 6 inches or greater. Thirty-one (31) trees were surveyed on the site; 28 of which are located on the eastern side. Nine (9) trees would have to be removed to accommodate the current development plan, and there is an additional tree that

is close to a retaining wall which might be impacted; however, there could be some re-design of the wall so the tree is not impacted.

As requested at the last meeting, story poles were installed and the project was evaluated based on the list of public places from the City's viewing evaluation map. The listed locations used to evaluate the impacts were Deer Hill Road, First Street, Highway 24, Sessions Road, Sierra Vista Way, and the BART station and parking lot. Due to its location within the developed residential neighborhood with its topography and trees, there is no offsite visibility from all of the locations except for Sierra Vista Way and Sessions Road. Given the nature of the development, everything along Sierra Vista Way is visible, so it is staff's opinion that the main use and reason for the map is to evaluate off-site views of open slopes and hillsides, and this is not the case with the Lot 66 development.

Ms. Sinnette said there is a table in the staff report listing the gross floor area of buildings along Sierra Vista Way, which range from 1900 SF to 4000 SF with an average of 2400 SF. With the current home at 2898 SF, the proposed house would provide a transition between the homes on Sierra Vista Way and those up the hill on Sessions Road, as those homes vary in size from 2700 SF and 4200 SF.

City Attorney Subramanian said the property is encumbered by an access easement, and in order for the City to grant the easement, it would not constitute a grant of special privilege that is inconsistent with the limitations upon other properties in the vicinity and in the zone in which the property is situated. Staff does not believe this would be the case; the property would have the same setbacks as other properties similarly zoned and within the Sierra Vista Way neighborhood. There would be a setback requirement of 20 feet from the front, 15 feet from the rear and 10 feet from the side, which are the requirements of the R-10 zone. In addition, the property would now have a single family home on the property, which is also consistent with the zoning and with the Sierra Vista Way neighborhood.

If the variance were granted as it relates to the entire parcel, if there were an easement on the entire lot, it would not necessarily permit development if there was further litigation in the future, and a court would have to determine that the easement would preclude development. However, if the court were to determine there is an easement over the entire property and the Council were to already grant the variance, the property could be developed, assuming the court would allow for development. Since this is a highly unusual situation, this might include an easement over the entire property. Also, in light of the fact that staff is recommending that the Council not actually make any determination or take action on whether there is an easement over the entire lot, another alternative that the Council could consider is not granting the variance nor denying the variance or requiring the variance as it relates to the easement that covers the entire property. Should it evolve into litigation and a court makes a determination that there is an easement over the entire property, then the applicant would need to come back before the Planning Commission and request a variance in order to develop. This could be something that the Council could consider and therefore, this would allow the court to make its determination and then the City would know exactly whether an easement does or does not exist. If there is no easement over the entire property, then a variance would not be needed at that time.

Councilmember Anduri said if there were another piece of property and someone has a five foot utility easement along the property line, and the property owner and easement owner agree it is there and applies for a variance with respect to that easement, he questioned if it was possible for the Council to grant a variance that encroaches into the easement. City Attorney Subramanian said the City only gets involved in easements that are access easements or those

that benefit the City. In this example, because it is a utility easement, the City would not be measuring the setbacks from that particular easement.

Mayor Tatzin said assuming the easement is there, and the applicant is proposing to build on top of the easement, what would happen if the City approves this. City Attorney Subramanian said if it were not something that benefited the City, the City could allow for development. Whether this violates the private easement would be a matter between the two parties, the City would require indemnification from the applicant. But, she said it is a matter that she would recommend the City not get involved in if there is no benefit to the City related to the easement.

Councilmember Anduri said in all his years on the Planning Commission and on the City Council, he has never encountered a case where a variance request would have the house in the easement. City Attorney Subramanian agreed it was a highly unusual situation, but this assumes there is an easement over the entirety of the property.

Councilmember Anduri questioned that if there is an easement, could the City Council grant a variance that would put a building in somebody's easement? Ms. Sinnette said there has been at least one incidence where an existing structure was replaced and in order to replace it, a variance to allow it to sit within the easement was granted. She said she did receive a request from a Councilmember as to the number of variances, if any, that have been granted to setbacks or setback from easements, and the list was run for those in the last 8 years. There was at least one that appeared to grant construction within an access easement. Mayor Tatzin questioned the type of construction, and Ms. Sinnette said staff researched its database and compiled a report that selected all variances approved in the last 8 years, which revealed 293. She found 108 that had to do with some kind of setback. 9 had to do specifically with access easements, and the one she found related to a property in 2005 for construction of a new detached, three-car garage to replace the existing carport within the access easement.

Councilmember Anduri questioned if the holder of the easement approved this. Ms. Sinnette said she did not know. She had not had time to research any of the variances listed other than to review the project description. He questioned if the City had the power to grant a variance that would enable a property owner to build a dwelling in someone else's easement. City Attorney Subramanian said she believes the City does. The question of whether it violates the easement between the two private parties is separate; however, she believes the City can grant it, assuming the findings can be made to allow building within the easement.

Vice Mayor Andersson said he assumes the legal logic is that the variance is not to the easement; it is to the City's own rules and regulations, and City Attorney Subramanian agreed.

Mayor Tatzin said in a situation where there is an easement holder and someone who owns the property would like to build upon the easement and has substantial economic power well beyond what the easement holder has. He questioned whether this creates a situation where if the government agency grants a variance to the easement on the argument, as well as the private property right, we are not required to enforce that, it would make it very difficult for the person who owns the easement to protect their rights because they do not have the same economic power that an applicant might have in this case. If this is true, he questioned what the remedial action is that the government agency can take to address that concern.

City Attorney Subramanian said either party could resolve this matter and determine whether there is an easement and determine whether the property can be developed upon in the courts through a quiet title action. There are several attorneys within the neighborhood and the

applicant is represented by an attorney. Although the City has encouraged this, it has not happened. In this case, the City Attorney has recommended that the Council and the City not be brought into the private matter, and whether the City grants the variance, it is still a separate issue for the courts to determine; however, she did not believe the Council was precluded from granting the variance on the property. Mayor Tatzin agreed, but he wanted to understand what the right thing to do from a legal perspective as to what is permissible for an agency to do.

Councilmember Anduri believes there is a distinction between the rights of the easement holder, but the City requirement is that there be a setback so many feet from a property line or if there is an easement, so many feet from that even if it is held by a separate owner. City Attorney Subramanian said the City deals with both public and private easements only for access. He said if the City's rule is that we are requiring a setback of 'x' number of feet from that easement, then he did not understand how the City can grant a variance that states the applicant can build in the easement. Ms. Subramanian said this requirement was put into place so that there would be ingress and egress to a property and the setbacks would allow for a bit of a buffer. In this case, there is a road that is co-terminus with the trail easement that runs across the property, and the setback from it is the subject of the second variance which will be discussed in greater detail. Therefore, the City believes there is appropriate access to the property and the adjacent property to the north. Whether the access should be the entirety of the lot is a separate question, but the intent of the setback requirement related to ingress and egress has been addressed as it relates to the existing road on the property. And, this is why she is comfortable with the Council being able to grant the variance for the entirety of the lot.

Councilmember Anderson said the City Attorney has offered another way of looking at this, which is important to restate; if the Council does not grant the variance, the issue would have to be resolved by the private parties and may or may not come back depending upon the outcome of litigation over that issue. It would push the matter away from the Council and it would have to be the private parties issue to work out until the courts resolved it, at which time the Council could review it again because the variance would be required, or, the matter could just go forward. He felt this might be a better way of removing the City from the question. Ms. Subramanian agreed, and noted that this option is only for the entirety of the easement on the property and she would not recommend this option for the second variance which is for the corner lot setback requirement.

Councilmember Federighi questioned the model presented before the Council as compared to the drawings, as it appears the front of the house faces Sessions Road and the garage faces Sierra Vista Way. The rear of the house is the area closest to the Swartz' and questioned what is the proper front yard of the house if the front door faces Sessions Road. Ms. Sinnette said when the project was first reviewed in early 2007, staff determined that Sierra Vista Way was the front yard because in looking at the subdivision map, this is the way Lot 66 is oriented. The Council has the authority to change this if it feels the front setback should be applied to Sessions Road. Councilmember Federighi believed this would make more sense, given the way the house is oriented. Ms. Sinnette said as proposed, the building is set back 5 feet from the trail easement; but physically set back at least 20 feet from the edge of the Sessions Road pavement.

Mayor Tatzin referred to page 3 of the staff report and said the Planning Commission asked for on several occasions a design where the house was at or above the 470 foot contour line and he questioned whether or not a plan that met that requirement was ever submitted. Ms. Sinnette said a plan was submitted and presented at the September 4th meeting which included a 1300 square foot home with a garage and driveway from Sessions Road.

Mayor Tatzin noted and confirmed that the plan before them was a somewhat different design than what the Planning Commission denied and one they had not seen. He questioned if there was an option for the Council to remand this back to the Planning Commission to review the design. Ms. Sinnette said given the findings and the reasons for denial, she did not believe it could. Mayor Tatzin said given that the input by the Planning Commission was on the prior design, he questioned the benefit of the Council considering the new design. Ms. Sinnette said this is a new hearing on appeal so the Council has the right to review this as a new design.

Councilmember Federighi said the Planning Commission wanted the design at the 474 contour interval, but the movement had been from the 461 to 462, and then 464 interval, and the new plan shows it at the 463 contour line. She asked if the new plan is closer to the Swartz' house by 6 feet, and Ms. Sinnette said the applicant wanted to maintain a house size from 2700 to 3000 SF. This plan shows a setback of 15 feet from the eastern property line and in order to have the additional 5 foot setback, they chose to move it forward by 6 feet down the hill. Councilmember Federighi confirmed that if the 15 foot setback from the property line were considered the rear yard, 15 feet would be required.

Vice Mayor Andersson referred to the removal of 9 trees and said there are 5-6 additional redwood trees and pines on the eastern side within a few feet of the house along with a drainage ditch and he questioned how realistic was it for those trees to be retained. Ms. Sinnette said foundations can be hand dug which is often a requirement when there is work approved in a drip line and these things can be looked at in greater detail if the first phase is approved. Also, they could continue to shift the house slightly to address the issue, as well, and this was one of the reasons they went from a 10 foot setback to a 15 foot setback because they are now able to save more trees on the eastern side and provide additional screening.

Councilmember Anderson reminded everyone that this is still the first phase; it is not so much about the particular design but more about trying to find a site to place a house on the property. The questions Councilmember Federighi raised in terms of where the front yard is, is relevant, but he did not think the Council should be concerned about the particular design as much as whether or not the location will work in order to go into the second phase.

Councilmember Federighi questioned if the Council then, in the first phase, is to consider the issue of variances. Ms. Sinnette said yes, in the light of location. She said regardless of whether or not the Council wants to consider a variance to a possible lot line to lot line easement, the applicant is pursuing a setback reduction from the trail easement from 15 feet to 5 feet. Regardless of whether a variance is granted or not for setback from the trail easement, this project will not impact the trail easement or the trail itself. Staff also shows justification for the variance because of the constraints on the lot such as the steep topography which requires a house be placed on the east side of Lot 66. Also, all properties within the R-10 district, even if they are a true corner lot that would have a 20 and 15 foot setback, would typically have up to 50 feet to accommodate a home, whereas if the 15 foot setback was applied from the trail easement, this would reduce the potential width of a home to 25 feet.

In closing, Ms. Sinnette said that this particular plan, even though larger and set a few feet forward from the plan the Planning Commission reviewed, addresses the impacts to privacy on the adjacent home to the maximum extent practicable. Given the size and scale of homes on Sierra Vista and those to the north on Sessions Road, the 2800 SF proposed does seem to be a good transition between those two neighborhoods. The project site is not visible from distant off-site locations and during the Phase II application, there could be refinement in the design that

could help mitigate some of the remaining visual and privacy impacts through color, building materials, and additional landscaping. Regardless of whether a variance is granted, the project will have no impact on the trail easement. Comments from the City Engineer, Fire District, and the City's traffic consultant show nothing which would preclude safe development of the property. This is a de novo hearing and the Council can choose to uphold the Planning Commission decision and deny the appeal or grant some form of approval. She said given the number of issues still outstanding, staff is recommending continuing the matter to January 12, 2008.

Councilmember Federighi questioned whether or not the City has ever specifically approved in the past a 15 foot setback variance to a front yard, stating a garage had been previously approved within an easement. Ms. Sinnette said she was able to run a report from the database which listed approved variance applications between 2000 and 2008. Out of 293 applications, there were 108 that dealt with some sort of yard setback request. Those were highlighted in yellow and vary between front yard, side yard and aggregate yards. 9 are highlighted in green that were specifically to a setback from an access easement, and there is 1 that she had previously discussed. Given the limited amount of time before the meeting, she did not research files and information obtained was as stated in the project description. Setback variances identified range from 1 foot down to 5 feet, 35 feet down to 25 feet, 22 feet down to 13 feet and 10 feet down to 7 feet.

The public hearing was opened.

DAVID BOWIE, Attorney representing Lamorinda Properties and owner Dick Holt, said it is important to discuss Phase I which is simply a presentation normally of a siting and massing study. There are usually no soils, drainage, easement, architectural details submitted, but in this case there has been. He said before the Council is an application which is far more advanced and sophisticated than is normally the case and the decision tonight will not be the final one. He feels it is appropriate to give the City's other advisory boards an opportunity to weigh in on the application and it should be sent from the Council to the Design Review Commission. Regarding whether or not there had been a smaller proposal further up the hill, they did which ended up being an 849 square foot habitable space plus a garage. They instead designed a 2898 SF home which includes a garage. The habitable area is only about 2350 square feet, and they are very much in line with other homes in the neighborhood. They have a 26,000 square foot lot which is larger than most other lots in the neighborhood as well. The only justification that anyone ever advanced for shrinking the home to 849 SF was that this would somehow mitigate the privacy concerns on the Swartz' home which is the only home that has any impact whatsoever on it. They have prepared a model in order to show how the homes are situated with respect to each other and with respect to Sessions Road. They moved it farther down the hill in the most recent submittal but in doing so, would preserve more trees. He said the model shows trees that currently exist and does not include any mitigation trees. The two homes are significantly offset from one another; the Swartz residence is much closer to the street and the rear of their residence adjoins the garage of this residence, which is not habitable and will not have any impact on the two properties. Additionally, there is a change in grade of about 8 feet. In addition, they set back the habitable space an extra 5 feet, which is also screened by trees, and there is a significant change in grade. Under all of these circumstances he thinks there is no significant impact on privacy to the Swartz residence. In comparing this with the neighborhood, he presented photographs showing that most of the homes are separated by much less distance, they are in roughly parallel positions on the lots and actually have windows that are offset and parallel to each other. So, the other homes have a much more significant impact than this property, which has literally no impact. The only windows proposed in the habitable area are

those that are much higher in the room and intended for light only. This is an issue; however, that will be taken up by the Design Review Commission.

In addition, Mr. Bowie said they had the permission of Mr. Swartz' tenant to go onto the property and take photographs of what it would look like for someone seeing it from on the property. What is shown is largely landscaping if standing outside the home and deliberately looking up in that direction. This is also before they add landscaping and before additional vegetation is done to create more privacy. The staff report has done a good job of summarizing the various issues, and he said one was the variance issue. The actual trail easement would not be impacted at all by the granting of a variance because the actual trail is on the paving of the road. For the same reason, the grant of a variance would have no impact whatsoever on the usability of the road itself because the paving is the area they are talking about in terms of the road. He said Mr. Martin, a civil engineer, is present and has done much of the engineering for the entire area. He has stated in the past and has submitted letters that this particular section of Sessions Road cannot be widened to the east because it is already far too steep to meet Fire District requirements anyway. What they have is a dispute over an easement which is more of a theoretical dispute.

Also, it has been suggested that there might be something unfair and that the City might be taking sides of one party or another over the issue of private easement rights. This is precisely why the City Attorney has indicated the City does not get involved in this matter, which is the correct position. If there is a private dispute over private right, this should be resolved by those parties themselves, but taking one side or the other is entirely improper. Regarding the easement covering the entirety of the property, he referred to the staff report and letter he drafted which clearly indicates a discussion of the history regarding the easement matter.

Public Comments:

MARK MITCHELL, Planning Commission, commented that he did not see minutes included in the staff report but he said with regard to the house, the Planning Commission did not have a problem with the size as it related to findings for neighborhood compatibility. The area with which they had problems with was the house is slightly smaller than 3,000 SF on a developable area of an area that is slightly smaller than 4,000 SF, and it uses a lot of that space. The Commission looked at the findings for hillside development permit 6-2071 and there were four aspects which was included in the packet. They could not make those four findings. Regarding the variance, two aspects were that if it includes the entire lot and the other was if it related to the trail easement. They wanted to look at the hillside development permit findings and then move onto the variance. They arrived at a resolution with regard to the variance also, but were told by the City Attorney not to consider the easement for the whole lot variance and they did not review this issue. Therefore, they looked at the variance as it relates to the trail easement. In the resolution, the Commission found that it would be a granting of a special privilege and they could not make the findings for the variance. Originally, there was a motion to deny with prejudice and the Commission decided to deny the application without prejudice which was moved and passed on a 5-0 vote, with Commissioner Chastain absent. However, for the resolution of denial, Commissioner Chastain voted in favor of the resolution of denial, so all Planning Commissioners did weigh in on the matter.

JEFF HARMON referred to remarks made at the last meeting, stating he was taken aback by Mr. Bowie summarily dismiss the idea of a semi-rural nature of their community. He reviewed the General Plan of 2002 and indeed the centerpiece of the General Plan is the semi-rural nature of the community. The findings support the General Plan, so adherence to these findings

is critically important and the chart in the packet does not adhere to many of them. As the Council considers variances, he asked them to think about how they erode the General Plan. At the last meeting, they discussed the majestic redwood groves that will decimated by the proposal and he believed the drainage swale was important and would cause a stability issue. He referred to Resolution 110-80 dated March 20, 1985 and he read it into the record, which referred to the requirement for a slope stability plan and effect on downstream properties. He said the plan is mysteriously missing from the file, but then Commissioner Guy Atwood who indicated that their major concerns in the area were impacts upon the existing homes from traffic entering and exiting the property, traffic visibility and noise. A number of steps were taken to mitigate the problems and trees were an important part of the solution and clearly planted to stabilize the hill and for soils and drainage issues. He said the road could have been moved over to the east virtually making any purported lot unbuildable except for the stated reasons in the conditions of approval. He also said he disagrees with staff's analysis relating to the house size comparisons, felt the home would be an eyesore and the story poles do not begin to demonstrate how imposing the structure will be when coming around the turn. It will also exacerbate the fire trap issue they have and said it mirrored the Northridge area and the Oakland Hills, stating there was supposed to be another access away from Sessions which never occurred.

Councilmember Anduri questioned the fire risk of having a dwelling on the property, and Mr. Harmon said the risk is if that the road gets plugged up which occurs often by trucks that are stuck due to the steep grade, and the only access that 22 residents have to get out of the area is through the left side of Lot 66.

KEN SARGENT said he believes that the Council should look at practical considerations. The County designated the lot as unbuildable and the neighbors feel that this is as close as one could possibly come to a non-buildable lot. He said regarding the City not being brought into a private dispute, he submitted that if this house is allowed to be built on the lot by action of the Council, this does bring all of the property owners having to take legal action to defend their rights. He did not believe house will ever fit into the neighborhood, said the opposition of the neighborhood is unanimous and no one is in favor of the application. He questioned whether there was any other house in the neighborhood that has required such a plethora of variances to be approved, believed building a house on the property was not wise, and suggested that if the Council approves the building of a house on the property, he urged them to turn down the applicant and require them to return to the Planning Commission.

Vice Mayor Andersson referred to Mr. Sargent's comment about a "plethora" of variances, but said there are two being requested, one of which does not impact the application. Mr. Sargent said there were variances for setbacks and for cutting down the trees, but this was not considered a variance but a permit.

CAROL HEHMEYER, licensed trial attorney, said she has litigated over easement issues and resided at 11 Sessions Road until last May and now lives in Concord. She said there are no attorneys in the neighborhood currently and she cannot believe the Council would consider overruling a unanimous decision of the Planning Commission denying without prejudice the third Holt application after two years of intense hearings, testimony and document review. She said the Council is being asked to take the vested deeded recorded property rights of 22 families by committing a structure to be built on a property entirely covered by 8 separate original grants of easements. She said if the Council agrees the house can be sited, this will be a taking by inverse condemnation against 22 families. She said the lot has been determined to be unbuildable by the Contra Costa County Assessor and by County Counsel for about 50 years.

She said the Council is required by law to respect easements by state law. Numerous inquiries about building on the lot have been refused by Planning staff for decades, the first application was declined for filing by Senior Planner Greg Wolff two years before the filing of the second application. Mr. Wolff correctly pointed out that the deeded recorded vest easement over the entire lot prohibits building on it. After this occurred, Mr. Holt's attorney spent two years in covert, clandestine, secret meetings and correspondence with City Attorney Mala Subramanian. The correspondence generated during this time has been disclosed in the file after demand from citizens. One letter appears in which Ms. Subramanian staunchly and correctly requires Mr. Holt to quiet title to the property and refuses him to file the application until he does so. No correspondence from Ms. Subramanian appears in the record to the contrary before the second application was suddenly accepted for filing by Junior Planner Glenda Warmouth in March of 2007. After intense hearings, testimony and review of documents, Mr. Holt withdrew the second application and this was the day after she filed the title report on Lot 66. In March of 2008, the third application was filed and accepted. Councilmembers have asked why no one has quieted title to the property as to the easements and this is an excellent question. It would cost the 22 homeowners who have vested property rights over the entire lot at least $25,000 to $50,000 to litigate a quiet title action in Superior Court and they would have no hope of recovery their attorney fees when they prevail. She questioned why Mr. Holt and his investors filed for quiet title after being asked to do so many times, and Mr. Holt would have to pay the same amount or much more to litigate this issue. He would have to prevail against each and all easements and each of the vested recorded deeds held by each of the owners of the 22 homes. Each of the properties has 1-4 of the 8 original grants of the easement to the entirety of Lot 66 for access and utilities. If he lost one of them, he would not be able to quiet title. Each original easement is separate from the other and do not build upon one another, and each stands alone and reinforces all of the others. Most property owners hold several individual grants, and each one would need to be defeated. Mr. Holt has no chance with the courts, but he is betting he has the chance with the Council. However, if the Council rules against the property owners and take away the vested rights granted in the 22 separate deeds permitting siting on the lot, the property owners will be victims of a taking by inverse condemnation. This will be monstrous and outrageous. The homeowners will sadly have a right to sue, have a right to recover attorney fees and costs and damages against the City and Lamorinda Properties, LLC. Title companies will be required by law to defend their insured titles for each of the easements in each deed. Those companies will also seek attorney fees and costs from the City when they prevail. The liability to Lafayette will be enormous and the City will lose and will pay. She asked the Council to respect the easements and do not take them away without a court ruling on the subject. She asked the Council to do as the Senior Planner and City Attorney originally ordered—follow state law, respect the decision of the County Counsel and Assessor and every title company in the County. If not, the City will be at immense litigation risk.

JEFF SWARTZ said he owns the property at 1139 Sierra Vista Way adjacent east of the property under discussion, said when he bought the home back in the mid-80's, he discussed the lot issue with the Planning Department who have always said it was unbuildable and then Mr. Wolff in the early 90's, pointed out that they had put the subdivision in, there were two blind curves coming into another blind curve and there was no way to build on it, as there would be accidents and a huge mess. He was really perplexed why Ms. Sinnette has been assigned to the application that has made error after error when the City could have had Mr. Wolff who was very familiar with the law and lot and the complexity of it. For instance, when the application was originally submitted, there was no mention at all of the lot to lot road easement and they showed the trail easement as "the road easement". There were decks and balconies approved on the initial application hanging over and within the setback boundaries, there was no variance required and Mr. Holt was going to be allowed to build within 5 feet of the road easement, and

this has been a series of obstacles they have had to hurdle every meeting, which is ridiculous. It gives the appearance to the public that there is more to this going on than there should be. He commended the Planning Commission for truly wading through the matter and he hoped the Council also takes a hard look at this for what it really is. The only possible building would be a small cottage stuck up in redwood trees which does not impact any variances if the Council must decide on something. He said they pulled the water meter on the property, they wanted to build a kiosk and gate which was not allowed, and he got rid of the sound wall with his neighbor because he was afraid that the noise would bounce back on his house, and he planted her hillside. I feel horrible for those that would no longer have a beautiful entrance to their subdivision if the house is approved.

Councilmember Federighi questioned whether Mr. Swartz' retaining wall was in place when he purchased his home, and Mr. Swartz said it was much smaller but whoever owned the property in the past would dump construction debris there, and he continued the wall up higher to carry this. He said his garage entrance came across Sessions Road and he confirmed he knew where his property line was. Councilmember Federighi noted that Mr. Swartz home was constructed some time before the subdivision, but asked if he was aware if his retaining wall was on the other property. Mr. Swartz said he was not sure this was his retaining wall; it could have been put in years ago, but he did add onto it because of the mud and debris sliding down what comes into his yard during heavy rains. No one else maintains it, so he took the initiative to do so.

PAM SWARTZ said given the fact that the Planning Commission unanimously denied the project and the fact that Mr. Holt's prior membership on the Commission rejected projects in the City of much lesser scope, and all Councilmembers are very uncomfortable in making any kind of decision, she asked this to return to the Planning Commission and that no decisions be made this evening. She also pointed out that because Mr. Holt has bee a long time member of the City government and many people know him well, she felt we need to pay strict attention to every decision made in this application. She is very disturbed by what she heard tonight from the City Attorney and Ms. Sinnette which seem to be arguments almost in favor of Mr. Holt's application. While she is not accusing anyone, she witnessed Mr. Holt patting Ms. Sinnette on the back as she walked which seemed inappropriate given what they are up against tonight. Regarding Mr. Bowie's comments, he said only her home is impacted. She felt this was one too many if it were anybody's home. He said the change in the grade on the hill prevents it from being an invasion of privacy, but this is the problem—it makes whoever is in the home peer down onto her home and bedrooms. She also is surprised that they did not obtain permission to go onto their property and they sneakily asked their tenants in order to take photographs. She did not know which Councilmembers visited the site, but said all they would need to do is look at the story poles of where the home would be to see that it would invade their privacy. She said there has been no precedence in this city for this type of exploited application and she urged the Council to take a hard look at this before taking any decision.

Councilmember Anderson said he did go out to the site, and he asked her to describe how the story pole siting affects her privacy because he said he could not see it. Ms. Swartz said she is not a contractor, but she has seen how tall the house is proposed to be because of the steep grade. The house is so close to them and will tower over their home. All of their bedrooms are in that back area and she agreed to provide him with another chance to tour the property if he wanted to.

Councilmember Anduri said Ms. Swartz began by stating the issue was privacy. He visited the site a couple of times and said he was not sure if he sees this either. From the plans, all the

windows that will be on the east side of the residence are going to be at least 5-6 feet high, so if someone is in the house, they will not be able to look down upon them. Ms. Swartz said regardless of the windows, the home is extremely tall and they could look down at them at any time.

LAKSHMAN WATAWALA said he lives at 7 Sessions Road, said his primary concern is fire safety. There was a report from the Fire Department when the application was made that states the driveway coming into Sessions Road is not supported, and the homes will be impacted by this. This is further aggravated by the fact of the steep grade changes. Trucks get stuck on the road and emergency vehicles must take the turn and go off of the paved roadway, which is not enough to make a turn. He said fire safety cannot be minimized by hiding the facts and saying there are no concerns by the fire department. He also cited traffic safety and said such a large home would further reduce already constrained visibility and urged the Council not to approve the project.

Vice Mayor Andersson noted that trucks already get stuck on the road and this application does not change Sessions Road at all. He questioned how this would fundamentally change the situation, and Mr. Watawala suggested Vice Mayor Andersson read the Fire Department's letter in terms of access, and secondly, when a truck gets stuck, the only way residents can get out is by going over Lot 66. He questioned the situation if someone got a heart attack or there was a fire and said no one would be able to get through, which he felt was serious.

Mayor Tatzin confirmed that if there is a stalled vehicle on Sessions Road, people would swing around to the east where there is now a proposal before the Council for a building.

Councilmember Anderson said he has a copy of the letter from the Contra Costa County Fire Protection District dated January 4, 2008 and he does not see that it states the house should not be built; however, it does have one condition which requires a grade difference of no greater than 10% within the first 10 feet of a grade break. This is the problem, and he suggested this be addressed through development of the property to eliminate the problem. But he did not see anything in the letter stating an actual concern by the District, but more a solution to the problem being cited. Mr. Watawala said the letter voicing concern was from the second application review by the Fire District and not this particular design.

C.W. CHUNG, President of the Northridge Park Homeowners Association, said there are 13 homes within the association on Sessions Road and are directly affected by the proposed development. During their annual meeting, they all objected to the development and all 13 homeowners signed a letter which was sent to the City and details their easement concerns. He said they were pleased and thankful that the Planning Commission rejected the application. He said the project will cause problems of safety, traffic, setbacks, privacy, runoff and environmental and he hoped the unanimous findings of the Planning Commission will be taken into account very seriously.

LES HAUSRATH, Attorney representing some of the Northridge Park Homeowners Association residents, said he disagrees with Mr. Bowie that the easement does not encumber the entire lot, said the trail easement is a 50 foot easement which is wider than the actual paved Sessions Road, and when a building is built 5 feet, it does encumber this. The paved easement would be suitable for people using the trail easement with some vehicular fashion but it would not be suitable for people who are not using it for vehicular purposes, so there is a potential encumbrance by building that close because it is 50 feet for a reason. Regarding the issue on the variance from the private easement, the City Attorney has suggested there is a possibility of

granting a variance from the lot to lot easement, but this concept does not work or make sense, as it basically ignores the easement. If the easement exists, it covers the entire lot, and one cannot vary from it as this would ignore it. He also thinks it is inconsistent for the City to say they will not recognize the private easement in analyzing the application, but suggests the applicant get a variance from that same easement. He thinks there was some discussion on the history of variances and he believes Ms. Sinnette's account is fairly distinguishable about re-building a garage in an easement, as this example was a situation where someone was building in their own easement. Procedurally, he said this appeal is a de novo hearing, but it seems that the Council has gone beyond a de novo hearing. A de novo would typically mean that the Council is hearing the appeal but it is taking new evidence, and he believed this hearing has gone well beyond this. The City has a brand new application for a different size house in a different location, with a different configuration, with a different number of trees being affected. He believes this is unfair and allows the applicant to bypass the Planning Commission, and there were problems even at the last Planning Commission about confirming the amount of square footage of the current application. He did not think it is appropriate for the Council to consider something brand new. What is before the Council is an appeal of an application for a particular house at a particular site that was denied by the Commission, and he felt it was problematic looking at a new application. Entirely new issues can be raised with the new application, and he felt procedurally, even considering this different application is inappropriate. Lastly, regarding the taking issue, there were indications from the Council that the question is where to put a house on the site. There also should be the question of whether there should be a house on the site. He said the site is not a buildable site, suggestion has come from the applicant that something needs to be approved because otherwise it is a taking, and also that the house needs to be approved in this size range of 2898 SF because a smaller house was deemed not suitable by the applicant or economically feasible. He disagreed that allowing a smaller house would be a taking, as suggested by the applicant, and he cited a case involving upholding a zoning ordinance that reduced the value of a property by more than 90% and the courts have ruled it was not a taking because there was some use left. He said the history of the lot suggests that there never could have been an expectation that the lot would be developed for a large, single-family house. Allowing a smaller house does allow an economic return and this is all that is legally required. The lot was clearly designed to facilitate the uphill development by placing the road through it and by encumbering it with many easements that encumber the entire lot, and it was never intended to be built upon. The economic use has already been realized out of this lot, because there are simply lots and properties that simply cannot be developed for the purpose for which the owners would like them to be developed for. There were 5 Commission hearings on the matter, and after significant testimony, he asked the Council to consider the history of the project. He also cited a San Francisco case; Guinnane vs. the City and County of San Francisco which was similar to this matter where use of a particular property was denied and he read the outcome of the case, which was ruled not a taking.

Councilmember Anduri asked if Mr. Hausrath believed the City Council has the power and authority to make a determination as to the existence of a private easement. Mr. Hausrath said yes, because it does come under the zoning and land use context. It is an impact that the City would need to look at to determine whether or not the property is suitable for developability or not.

Councilmember Anderson questioned the quiet title processing, particularly from his client's perspective, and asked if this would be considered as making any sense as an option for his clients to pursue. Mr. Hausrath said from an economic standpoint, it does not make sense to the property owners. The estimate might be low and given 22 plaintiffs, the lawsuit would be extremely complicated. He said Ms. Hehmeyer is correct in her statement that all easement

rights are different. A parallel point to this is, why should the property owners have to bear this cost. They have those easement rights today. Someone else wants to do something to impact those rights and it is up to that person to challenge this, and this is why there has been no filing of a quiet title action by any of the property owners.

Councilmember Anderson said it would seem them that the City Attorney's option of the City not granting the variance and allowing the project to move forward as an approved, buildable site would in fact call the question. It would then be a litigation issue between the easement owners and the property owner interested in developing the property. Mr. Hausrath said the City would also be involved because the City is the one who granted the entitlement to proceed. Property owners would be required to challenge the City's action, coupled with the effort to resolve the easement dispute.

Councilmember Anduri questioned Ms. Subramanian if the City Council has the power and authority to make a determination as to a private easement. Ms. Subramanian said she did not believe this was within the Council's purview, especially when the private easement does not affect the City or the public as a whole, so there is no City interest involving itself in a private easement.

Councilmember Anduri said if the Council was to make the approval for Phase I, he questioned whether it would be in turn, approving a private easement. Ms. Subramanian said no, the council would not be approving an easement nor would it be taking any opinion or action as to whether an easement actually does exist on the property. Councilmember Anduri said if the Council moved ahead and one of the 22 easement holders were to sue, they would sue the applicant, and he questioned if there was any liability for the City. Ms. Subramanian said she would assume the City would be brought in but the City is indemnified by the applicant, so the applicant would be required to either defend the City and/or pay for the City's legal fees. She said this has happened before in other situations.

Mr. Hausrath said Ms. Hehmeyer mentioned there was also a possible theory that, by the City approving an application, it is affecting the property rights of the property owners, and he thinks this is a viable theory but was not prepared to comment on it one way or another. Councilmember Anduri questioned if he ever heard of this position being taken, and said he did not feel there was a taking claim on the applicant's side, but wished the attorneys would stick to plausible arguments. Mr. Hausrath said he was not prepared to comment further on Ms. Hehmeyer's legal theory and feels it is not appropriate.

Rebuttal – Applicant

David Bowie said the Council is faced with the process of balancing neighbor's rights and the property owner's rights. He said he heard a lot of confused legal analysis and the City Attorney is correct in that he does not know of any Council that sits as judge over litigating private rights of private property owners. If there was litigation between the private property owners, it would not involve the City; the only rights enforced would be the private property rights if any of the private parties litigate. The City is not a party of this and the City will take no position with respect to it, so there is no role for the City to play in any such litigation. In the event it was improperly included as a party by the neighbors, the City Attorney is correct in that the City would be indemnified by the applicant regarding any exposure the City may have. Anyone with a proper case can make a showing for injunction and get an injunction against Mr. Holt for proceeding with his development plans.

He said he takes offense by the straight forward suggestions by neighbors that somehow Christine Sinnette and Mala Subramanian are in league with him just because they do not agree with everything neighbors have said. He thinks staff has dealt with this project in a completely ethical, appropriate and independent fashion. He also finds it amazing that Mr. Holt who has served for 25 years on the Planning Commission ends up being criticized for taking the same rights that any other person might do with respect to his property. The fact that he is on the Commission does not necessarily mean that someone will look at it in some favorable fashion to him. Obviously, this has not happened, and therefore, there is speculation.

Also, he has heard of many horrible constraints on the lot, which he felt is ridiculous. The staff report suggests that there are no geology, drainage, soils, or any physical limitations whatsoever that affect or prohibit development of the property. He said the constraints are the allegation over an easement which covers the entire property which has yet to be proven, as well as a variance for a trail easement. He said these are the only issues, as there are no other constraints on the lot. It is unusual because it happens to be bisected by a paved road, but it is much larger than all of the surrounding lots. He felt this situation is where the staff report on pages 6 and 7 give all of the factual reasons why variances should be granted. He said if the Council chooses turning down and tries to prohibit development of the lot, the City will be a defendant in that lawsuit and it will be a lawsuit over a taking. They are entitled to build because the lot is legal and lawful, the determination of which has already been made by the City Attorney. It was suggested to them to build a smaller home, but this would still need the same variance. The only justification for a smaller home was privacy impacts and there are none.

Councilmember Anduri asked Mr. Bowie to explain why the Council is considering the new design and application, and he questioned why shouldn't the Council send it back to the Planning Commission? Mr. Bowie said it is really not a new application or new design; the application is a siting and massing study. It does not have the architectural detail that one would expect to find at a later stage of the application. He said the finding would say this is the only place one could build, this is the same size home ±100 square feet, and there is no significant or material difference between this submittal and the prior one, except for the saving of trees.

Councilmember Federighi questioned if it was Mr. Bowie's position that any lot of record is a buildable lot, and Mr. Bowie said no, because there could be physical circumstances that would preclude building. For example, a deep seated landslide that could not be repaired because of its boundaries, but he said there are no identified physical constraints that apply to this property at all. In the absence of that, given that they have appropriate zoning and consistency with the General Plan, it is a lawfully created lot, and the applicant clearly has a right to develop the lot. He said the bottom line is that if the Council will require something smaller to be built, they cannot be arbitrary and capricious and say it should be smaller, but there must be a reason to support it. And, he did not feel there was a reason based upon the size and compatibility with the neighborhood, privacy impacts, or anything else. And, building an 849 square foot house would be arbitrary and capricious and utterly unjustified because there is no factual basis to shrink the size of the home.

Vice Mayor Andersson said Ms. Hehmeyer indicated a scenario which, in order to quiet title, you would have to quiet title on several easements from each of 22 families, resulting in dozens of lawsuits and legal fees. He asked what Mr. Bowie's interpretation of what would be necessary if the applicant decided to quiet title. Mr. Bowie said it would be nothing remotely to what Ms. Hehmeyer had contemplated. He said this falls into a legal interpretation of the chain of title in the import of all of the various documents that have been recorded and this has largely been done in context to letters he has already submitted to the City. It could be decided as a question

of law on a summary of judgment motion basis or another variation, but he said the City will not get testimony by witnesses because there are not factual issues involved. Secondly, assuming that there was a legal interpretation that somehow concluded that there was an easement that extended across the entirety of the lot, then there is a question of whether that overburdens the property, because the law does not favor an unnecessary overburdening of the property. This would be based upon actual evidence and testimony and this would require expert witnesses, and not lay witnesses. If you are the underlying owner of the easement, you have the right to use your property any way you want as long as you are not inconsistent with the reasonable use of the easement. So, even if they are wrong on that, they could be right on the second point and his position is that they would be absolutely right on that. He said quiet title actions involve no defendants, publication, everyone is brought before the court in a single action and this is it. Also, the only reason they did not bring quiet title is because his client did not want to have to sue everybody.

Councilmember Federighi said safety issues were raised, noted there was one letter from the Fire District and another letter dated August 27th where the Fire District states, "it would prefer access be provided for the Sierra Vista Way because Sessions Road did not provide an adequate, drivable surface for a roadway that exceeds 16% grade. The Fire District allows the maximum grade of 20% for residential projects and Sessions Road has a grading of approximately 23%." Mr. Bowie said Mr. Martin could speak to this; however, the staff report states that the Fire Department did not have a problem with this development because this is an existing problem with Sessions Road whether they do anything or not.

Howard Martin, Schell and Martin Engineers, said part of the standard detail drawing for an ascending driveway is to have the first 10 feet 10% before transitioning to 20%. The maximum slope needs to be 25% with the County and it has been reduced down to 20% by the Fire Department. The road exceeds in some cases 27 or 28% as one gets up past the parcel, but there is room at the bottom of Sessions Road to actually re-grade this, put in a section of 10% and alleviate the problem of trucks getting stuck at the bottom of the hill.

Councilmember Anduri said in terms of neighborhood compatibility, he questioned if Mr. Martin was aware of any other situation where within a distance of 20 feet wall to wall there is a 41 foot difference between ground level and the top of the roof? He noted that the elevation of the Swartz' floor is 454 feet and the elevation at the top of the roof is 495 feet, or 41 feet above the ground. Mr. Martin said this accounts for the change in grade, and his recollection is that if you drive Sierra Vista Road, which he did Friday, there are at least two homes on Sierra Vista which are the classic remodel and at least one, as you go up the street, is significantly higher in grade and height. And, there are no trees for screening, whereas on the Holt project, there are a number of trees that would screen that difference very effectively. From the Swartz' standpoint, it simply does not loom because it is already screened.

The public hearing was closed.

Councilmember Anderson questioned the content of the de novo hearing and asked if there was any concern from the City Attorney. Ms. Subramanian said no; it is a de novo hearing and typically the Council does hear the application that was brought before the Planning Commission. But, because it is de novo, the Council always has the ability to revise the application, and this application in concept was reviewed by the Planning Commission.

Councilmember Anderson said there have been several references by homeowners about the County's statement that this is not a buildable lot, and he questioned what this is based upon.

Ms. Subramanian said staff is only aware of the County Assessor and how they assessed the lot. She said there was some reference to County Counsel's opinion which staff has never seen, nor does staff know that it exists. So, what the Assessor has assessed it as is not relevant to the Council's review of this matter.

Councilmember Anderson confirmed with Ms. Subramanian that therefore, if the County Assessor has assessed the property as un-buildable, it does not create a legal issue for the City as to its build-ability.

Mayor Tatzin said there are a couple of ways to deal with the issue of the easement, recognizing that the City would not be involved in that, and he questioned if one part would defer the decision while this was being worked out. Ms. Subramanian said it would be taking no action on the variance request for the entirety of the property. It would not require the variance, nor would it grant or deny the variance. In the event that there was litigation on the property and a court were to determine that there is an easement covering the entirety of the property, the applicant would have to come back and request a variance. This is part of the deferral.

Mayor Tatzin said if this were done, he questioned if the hearing would be continued. Ms. Subramanian recommended taking action on the variance as it relates to the setback to the trail easement because this is not in dispute by any of the parties, and the massing would also need to be addressed at this point.

Councilmember Anderson referred to the trail easement, stating he knows several people have brought forward the trail easement variance as a concern from their perspective, but what Ms. Subramanian is saying is that the City has no concern about its ability to have the trail access, as it is the City's easement. So, he confirmed with Ms. Subramanian that it was not being compromised by a variance. Ms. Subramanian said the paved portion of the road is adequate for trail purposes.

Councilmember Anduri said there is something in the plans about the gravel path along the side, and he questioned the status of this. Ms. Sinnette said this has not been taken to the Parks, Trails and Recreation Commission. It is staff's opinion that if this project moves forward, this could be part of the Phase II application. Staff does not feel it has any bearing on the siting of the home at this time.

Councilmember Anduri questioned how close under the current proposal would the corner of the house be to the pavement, and Ms. Sinnette said the closest part of the house is 20 feet from the edge of the pavement on Sessions Road, which was stated in the staff report on page 7, the third paragraph.

Mayor Tatzin said assuming the Council were to approve a general siting concept and not take any position on the private easement, if there were subsequent private litigation and Mr. Holt chose to sell the property in the intervening period and another owner came forward and received the entitlement and they were represented by different attorneys, then there is always the possibility that the City's position might be misrepresented to the court in terms of the meeting of what it did when it approved the siting. Therefore, he questioned what procedures, if any, are available to the City to make it clear to the court that the City's action if it were to take one, should really have no bearing at all on the court's decision regarding the scope of the private easement. Ms. Subramanian said this is a good point; staff's recommendation would be that if the Council were so inclined, staff would bring back a resolution detailing what action the

City is taking and what action the City is not addressing specifically as it relates to the private easement over the entire property.

Councilmember Anduri said Commissioner Holt has given great public service to the City and all of the Councilmembers have served with him on the Planning Commission, but he said this does not impact the Council's ability at all to make the decision and the public should be aware of this.

Councilmember Anduri said he wanted to address some of the concerns raised by the neighbors. The reason the Council is entertaining the application is because they must, and they have no choice. There is a right to appeal and the Council must hear the appeal. It takes a lot of time to hear the appeals, but if anyone appeals, the Council is obligated to hear both sides and make a decision. Under the City's ordinance, it is a de novo hearing so the Council must hear all evidence. He said the site does appear to be very constrained and he said the first time he saw it, he was very surprised. However, as he has read all materials and background, it becomes a more plausible application in his opinion. In terms of the findings that the Council must make and issues addressed, he feels strongly that the Council should not address the private easement issue and make no decision on it. With respect to the variance for the trail, he said based upon what he has seen, based upon the circumstance of the lot, granting this variance he feels is appropriate.

With respect to the findings required for the hillside permit, the ones that have been discussed, Councilmember Anduri said a number of issues have been raised by opponents, but in going through various requirements to make findings, one finding relates to loss of privacy from the viewpoint of the next door neighbor. He felt the windows would be at 5-6 feet and one would basically have to be 6'6" and stand at the window in order to look down into the neighbor's backyard. So, he did not believe there was a violation of privacy concern as he could see. What does concern him is the looming impact of the house. One concern was expressed at the last meeting regarding loss of light. He visited the site today and the house would come no where close to blocking light that is coming in now and in the summer, the sun would be setting a little bit further and he cannot make this determination. However, it appeared there would not be blockage of light. But, for a person who is 6' tall, in looking at something 30 feet tall at 20 feet away, he felt this is a huge building and this is his concern and he believed the Council should consider how great of an issue this is.

He said he believes the Council and the Planning Commission clearly have the authority to make a determination regarding the mass not being allowed and mandate a smaller square footage in order to meet the requirements, and he felt there was absolutely no way that a court would find that this would be a taking. He said he would, at some point, like more information about the emergency vehicle issue and whether it was anticipated there would be a space on the property where vehicles could travel over the property.

Councilmember Federighi said in terms of the variance that covers lot line to lot line, she felt that the project's front yard and a variance for a 20 foot setback from Sessions Road must also be considered. Another issue is that she would consider the north and south as the sides of the project and she is also troubled by the looming effect the project would have on the Swartz' house, as the current application moves the house closer by 6 feet. Also, she was more concerned about how could a house be placed on such a small lot before she saw the story poles, and was also struck by the fact that the Swartz house is built practically to the property line and the retaining wall on their property is truly on the Holt's property, which exacerbates the already difficult situation. In terms of compatibility, she agrees that the proposed house is

compatible in square feet to others in the area, but she may differ on this because of the home's looming aspect. However, she also questioned a 849 square foot living area, stating that in the Council and Planning Commission reviewing of house sizes, they looked at a minimum house size with garage at 2,500 square feet.

In terms of privacy, Councilmember Federighi said she walked up and down the property and she could not see into the backyard of the Swartz' house when she was at the top of the hill, so she did not see the privacy problem. She also could not see a big visual problem from below.

Vice Mayor Andersson agreed with most of Councilmember Anduri's comments. He said when Commissioner Mitchell indicated that the Commission could not make a finding that it was a granting of special privilege, he was surprised by that. Given the crease in the middle of the lot and the narrowness of the buildable site, he did not see how one could not make that finding. He did not agree there were privacy issues, but he did agree that the house does loom, and perhaps stepping back the second story from where the garage is would be better to give the house more of a terraced look. He voiced concern about the redwood tree screen to the east of the property. They are very close to the proposed building site and he questioned whether or not they would live or not.

Councilmember Anduri referred to the Pointe development and questioned the disposition or conclusion of the trees for the site. Mayor Tatzin said they moved the retaining wall back substantially so that the development would not impact the health of the trees.

Vice Mayor Andersson referred to the access to sunlight, he said he calculated solar angles for years and this construction might cast a shadow on the back bedroom window a few hours in late June, but less than the redwood trees that are already there.

Councilmember Anderson said it is difficult to make everyone happy when people have such a great deal of passion and concern for these kinds of projects. He thinks that if the City has a resolution regarding the easement over the entire lot in question would address his concern because the City is not actually in conflict with this. It may also facilitate any litigation processes that will happen and the City can stay outside of that process. Regarding issues of privacy, he does not believe there are any. He voiced some concern relating to the removal of the trees. He said he was looking through the findings for a hillside development permit and there is one which states that the development will preserve open space and native vegetation, yet the house is sitting right in the middle of it. So, it might be necessary to have the house, but he questioned where 70 trees would be planted as mitigation. There was also a point about the semi-rural atmosphere and the General Plan, but he felt this is a situation where the neighborhood has houses in place already and he did not see how that would change the atmosphere of the overall environment. Regarding the fire access issue, he thinks that the January letter addresses access from Sessions Road, but if it does not, the issue of the transition was noted by the Fire District and they intended to have that remedied by the developer. So, a resolution would be made to the problem of trucks getting stuck, and he hoped it would be part of the conditions of the Fire District's consideration for the project. With all of these pieces in place, he felt the City has a proposal that in terms of massing, should proceed forward, and that hopefully, if the City can stay outside the easement question and litigation, this can be resolve separately through the courts.

Mayor Tatzin said he would agree with most of what has been said, but disagrees in one area, stating that in the staff report there is a suggestion that the house will provide a transition between the homes on Sierra Vista and the homes on Sessions. He believes strongly that this is

part of the Sierra Vista neighborhood and it has nothing to do with the Sessions neighborhood. Therefore, the only relevant house sizes are those on Sierra Vistas, and the Holt house is about 15-20% larger on a lot that is clearly constrained by having a road down the middle of it. So, if anything, the house should fall on the smaller side of the Sierra Vista home sizes. He would not be able to support massing of this magnitude. He would be able to support something that has the perimeter where it is conceptually shown, but ultimately the house should be reduced down to a smaller size. So, he could see approving this, but at an immensely lower massing level, along with making it clear upfront that the City takes absolutely no position on the private easement and that the City's ultimate action would be solely dependent upon whether a buildable parcel actually exists.

Councilmember Federighi agreed with Mayor Tatzin in that the house was part of the Sierra Vista neighborhood. Councilmember Anderson questioned whether the Council would want to set a square footage or give more constraint to the building envelope at this point or would the Council provide guidance to design review as it goes through the second phase of development.

Mayor Tatzin said in addition, there might be more tree protection with a smaller house, he does not know what the solution is and also not what the size should be, but he strongly feels the size is much larger than what is required to provide economic value for the lot.

Vice Mayor Andersson suggested that 1) the size be more consistent with homes along Sierra Vista Way; 2) that some effort be made to improve the chances of the adjoining redwood trees to survive; and 3) that the front of the house's second or upper story set back above the garage and terraced. Councilmember Federighi also asked that it be moved further away from the Swartz' house than what the current application requests.

Councilmember Anderson suggested staff return with a resolution that will relate to the City's non-position on the easement question and language that represents what was just stated and this would move the project onto the next phase of consideration. Mayor Tatzin said the other option is to uphold the Planning Commission and to deny this without prejudice and provide feedback to the applicant because the direction the Council would give to design review is unclear and he felt also that design was not the Council's role.

Councilmember Federighi confirmed that Mayor Tatzin was asking the applicant to redesign the plan along with the Council's comments rather than go from here to design review. Councilmember Anduri said if there is no approved siting and massing, he asked if the proposal could be sent to design review, or wouldn't it need to go back to the Planning Commission.

Mayor Tatzin said one option is to come up with some massing guidelines based upon not accepting the current application, but overruling the Planning Commission's denial for an application before the Council. Or, the Council can keep it with the Council and have something return to the Council that is an agreeable massing level. Or, the Council could simply deny without prejudice and provide comments to the applicant if they choose to re-apply, in which case they would go to the Planning Commission with the new application.

Councilmember Anduri confirmed the three suggestions Vice Mayor Andersson made earlier. Councilmember Anderson said if the house moves back, it would go into the slope and the actual height of the building is consistent, but it would not look as high or looming on the Swartz side.

Mayor Tatzin suggested continuing the matter until the three options can return and allow for more discussion to occur between staff and the applicant and try and work out a solution to the three comments and/or others. City Attorney Subramanian noted that staff would also draft a resolution in terms of parameters relating to the private easement and the three comments of Vice Mayor Andersson.

Mayor Tatzin agrees with Vice Mayor Andersson's suggestions, but he said the Council is hearing an appeal of a soon to be modified application that is not actually before the Council. Ms. Sinnette said this sort of discussion occurs often before the Design Review Commission and Planning Commission and sometimes the motion is to direct the applicant and staff and return at a later meeting. Staff would support continuing the item to a later meeting and get together with the applicant and consider the suggestions made. Councilmember Anderson agreed that the Council has the ability to do anything it wants to regarding the appeal, he supported the resolution returning and to have something back from staff and the appellant that shrinks massing, and move from there. However, it seems that the Council has taken many of the issues that were standing in the way of making the findings for approval off the table and he was not sure why the Council would deny it and then ask the applicant to return to the Planning Commission.

Councilmember Anduri still voiced concern with fire access and traffic safety issues. Councilmember Anderson said the letter is dated January 4, 2008, condition 2 from the Fire Protection District talks about a modification of the surface transition from Sierra Vista Way to Sessions Road that will reduce the grade difference to less than 10%. The engineer also indicated that the access will be improved and required of the appellant. Therefore, this would eliminate the stuck truck problems and the fire trucks will also be able to travel up the hill, which would be an improvement.

Ms. Sinnette said she spoke to Ted Leach in the spring about this requirement and he indicated that the concern was no longer an issue. She reconfirmed this last week by telephone conversation with him; when he wrote this, he did not realize the work had already been done, but either way, the Fire District is no longer requiring the condition and believes it has been addressed. She will attempt to get this follow-up in writing and Councilmember Anderson requested this be done because without this, the issue is a valid concern.

ACTION: It was M/S/C (Federighi/Anderson) to direct staff to work with the applicant and address issues relating to massing, tree protection, size, and others as stated in the record and continue the matter to January 26, 2009. Vote: 5-0-0 (Ayes: Tatzin, Andersson, Anduri, Federighi, Anderson; Noes: None; Absent: None).

Ms. Sinnette said there was comment that Sessions Road be considered the front yard, and she asked the Council to make a motion and determine whether this is agreeable. If this is done, it has a bearing on how the variance has been noticed and staff will need to re-notice the variance application.

MOTION: Councilmember Federighi made a motion to consider the front yard as facing Sessions Road.

Vice Mayor Andersson questioned if this would trigger the need for a variance for setbacks, and Councilmember Federighi said the 20 foot front yard setback is affected, but this is the same thing as the trail easement if the Council does not consider the lot to lot line easement. Ms. Sinnette said she would need to notice it as reducing the setback 5 feet from the required 20

feet instead of 15 feet. Mayor Tatzin questioned what this would do with the siting of the structure to be on Sierra Vista Way, and Ms. Sinnette said it has a secondary impact on how the setback is looked at between the Swartz house and this house. There would no longer be the option to have less than 15 feet at that setback because now it only needs to be 10 feet.

Mayor Tatzin said he felt the argument relates now to the size of the variance as opposed to the location of the house, but Councilmember Federighi felt the front of the house was on Sessions Road.

There was no second to the motion, and the motion died for lack of a second.

BREAK

Mayor Tatzin called for a brief break and thereafter reconvened the regular meeting.

EXTEND MEETING

ACTION: It was M/S/C (Andersson/Federighi) to extend the meeting for 15 minutes. Vote: 5-0-0 (Ayes: Tatzin, Andersson, Anduri, Federighi, Anderson; Noes: None; Absent: None).

B. Ann Merideth, Community Development Director
Ordinance 578 repealing Chapter 6-26, Public Art, and adding Chapter 11-7, Public Art, and Resolution 2008-44 setting a public art fee and maintenance endowment requirement
Recommendation: Adopt Resolution 2008-44 and introduce Ordinance 578 and continue to January 12, 2009 for second reading and adoption.

ACTION: It was M/S/C (Tatzin/Federighi) to continue Item 10B to the meeting of January 12, 2009. Vote: 5-0-0 (Ayes: Tatzin, Andersson, Anduri, Federighi, Anderson; Noes: None; Absent: None).

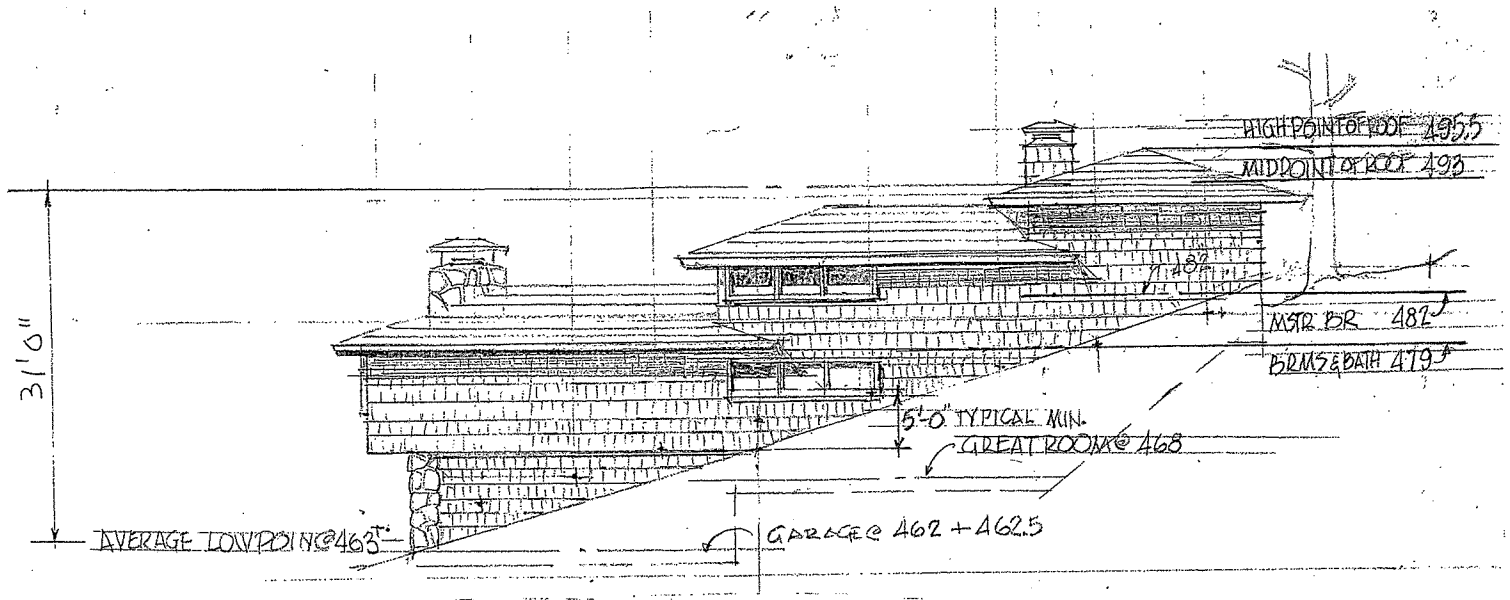
11. CONSENT CALENDAR

Mayor Tatzin said he was asked to read a comment regarding Item 11H. Councilmember Anderson asked to remove 11D.

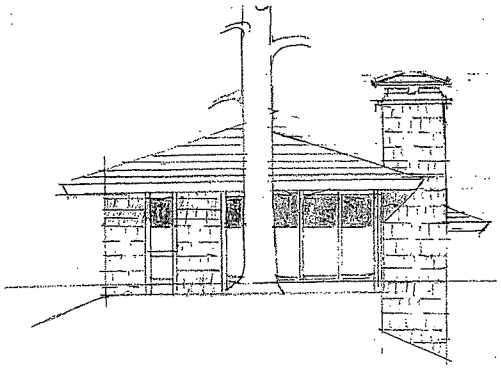
ACTION: It was M/S/C (Federighi/Anduri) to approve Consent Calendar Items 11A, B, C, E, F and G. Vote: 5-0-0 (Ayes: Tatzin, Andersson, Anduri, Federighi, Anderson; Noes: None; Absent: None).

A. City Council Minutes
November 24, 2008
Recommendation: Approve.

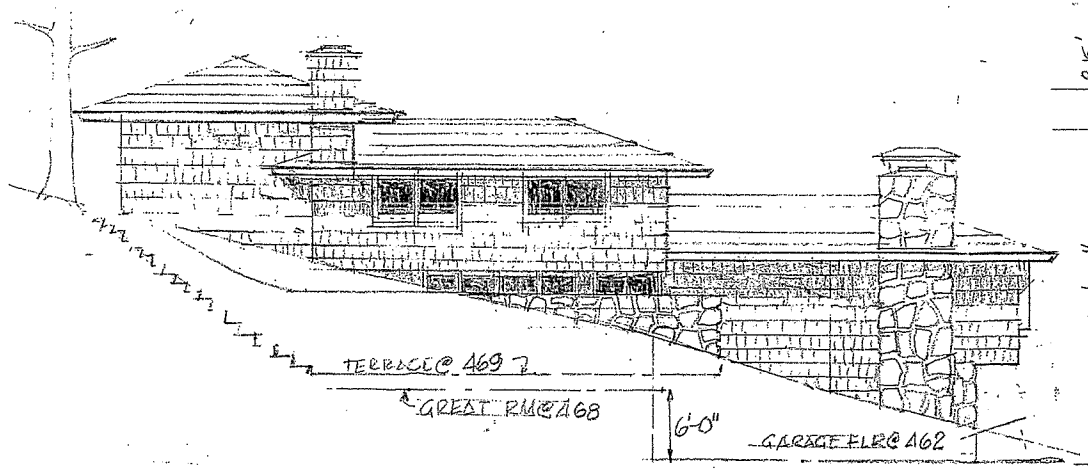
B. Resolution 2008-050 Reappointing members of the Bicycle Pedestrian Advisory Committee, Circulation Commission, Code Enforcement Appeals Board, Design Review Commission, Parks, Trails & Recreation Commission and Planning Commission
Recommendation: Adopt Resolution 2008-050.



EAST ELEVATION

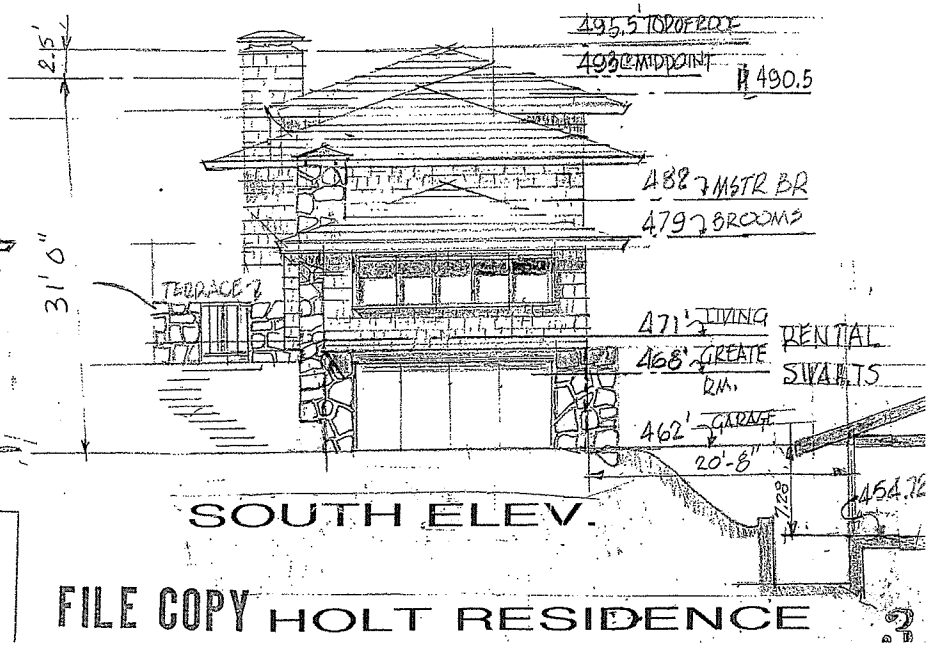


NORTH ELEV.



WEST ELEVATION

SCALE 1IN. EQUALS 10 FT.



SOUTH ELEV.

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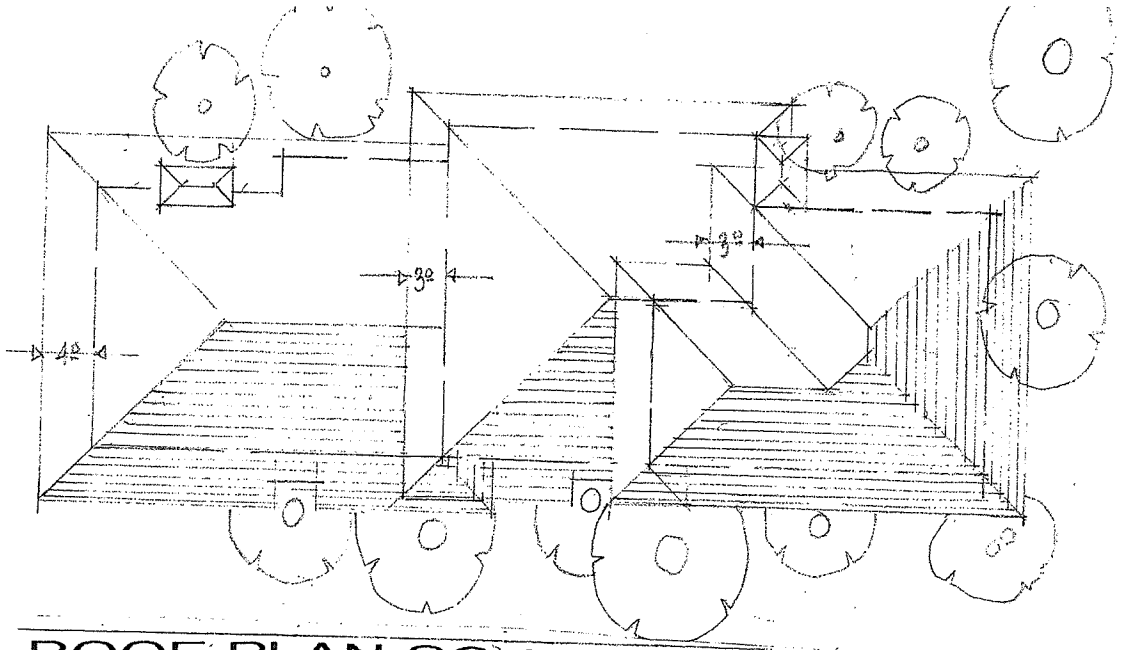
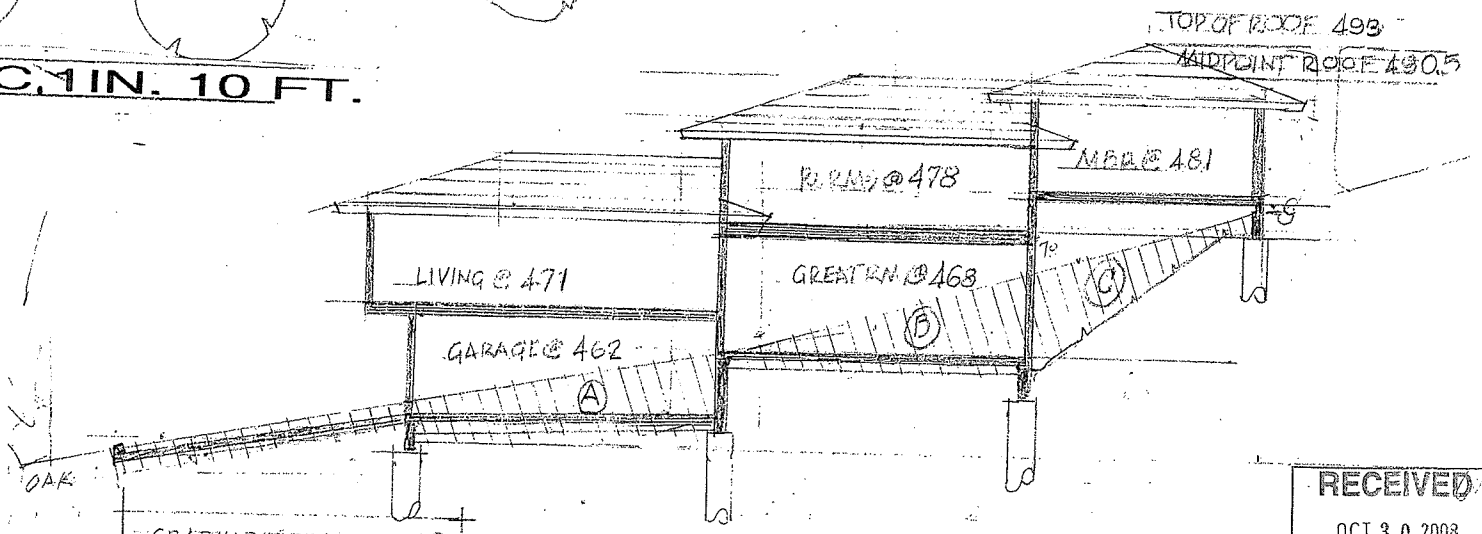
ATTACHMENT 5



ROOF PLAN SC. 1 IN. 10 FT.



GRADING CALC'S - CUT

(A) 2/3 × 6 × 8 = 164 C.Y.

(B) 2 × 8 × 8 = 128 C.Y.

(C) 1/2 × 12 × 8 = 144 C.Y.

TOTAL CUT = 436 C.Y.

SECTION A

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